Real Property

Real Property

A. Introduction and Terminology

Question: Who is the Nation's biggest landowner?

Answer: Uncle Sam.

The federal government owns nearly one-third of all the land in the United States. The pattern of ownership is geographically imbalanced, with the United States owning large portions of land in several western states and very small amounts in many eastern states. It averages out, however, to slightly under one-third.[1]

At one time or another, the federal government owned most of the land, apart from the original 13 colonies, that is now the United States. It acquired this land by purchase (the Louisiana Purchase of 1803, for example) and by conquest (the Indians). The legal basis of the federal government's title to its original lands (the theories of title by discovery and title by conquest) was explored in depth, and settled, by Chief Justice John Marshall in an early decision of the Supreme Court, Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

The history of America in the 19th century is largely the story of the acquisition and disposal by the United States of the "public domain." The land policy of the United States during the 19th century was, in a word, disposal. Land was granted to individuals for homesteads and farming, to states for various purposes, to railroads, etc. It is largely in this way that the Nation was built.

Federal "management" over the public domain during this period was virtually nonexistent. As the public domain diminished, America began to develop a heightened awareness that its resources were not unlimited. Gradually toward the close of the 19th century, and more rapidly in the 20th, federal policy shifted from disposal to

[1]More precisely, the figure was 29.15 percent as of 1990. Marla E. Mansfield, A Primer of Public Land Law, 68 Washington Law Review 801, 802 n.1 (1993). The material in this Introduction has been distilled from many sources. A couple, in addition to the Mansfield article, are George C. Coggins and Charles F. Wilkinson, Federal Public Land and Resources Law (1981), and Paul W. Gates, Public Land Law Review Commission, History of Public Land Law Development (1968).

retention.[2] Along with retention came the need for management and conservation.

The first stage of this new policy was "withdrawal." When land is "withdrawn" from the public domain, it is removed from the operation of some or all of the disposal laws. All federal land has now been withdrawn from the homestead laws. The concept of "withdrawal" is still used, but it now has a somewhat more limited meaning. When public land is withdrawn today, it usually means withdrawal from sale or some form(s) of resource exploitation. Section 103(j) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1702(j), provides a statutory definition:

"The term 'withdrawal' means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . . ."

Once public land has been withdrawn, the next step is "reservation." The reservation of withdrawn land means the dedication of that land to some specific use or uses. Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1479 (D.C. Cir. 1995). Most federal land is now reserved. The Supreme Court has upheld the power of Congress to withdraw and reserve public lands. Light v. United States, 220 U.S. 523 (1911). Withdrawals and reservations may be temporary or permanent. The concepts would have no particular relevance to land which is newly acquired now or in the future for a specific purpose.[3]

[2]This policy is now reflected in the Federal Land Policy and Management Act of 1976, which declares it to be the policy of the United States that "the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1).

[3]"Acquired lands" are sometimes distinguished from public domain lands. See, e.g., 30 U.S.C. § 351. The former are lands granted or sold to the United States by a state or private party whereas public domain lands "were usually never in state or private ownership." Watt v. Alaska, 451 U.S. 259, 264 n.7 (1981), citing Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 65 n.2 (1966); B-203504, July 22, 1981. For purposes of our discussion, it is sufficient to note that the distinction exists.

Withdrawal is usually accomplished by an act of Congress, which may be specific or may delegate the power to the President or to an executive department. If Congress chooses to delegate, it may prescribe the method by which the authority is to be exercised. Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970); Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980).

The executive branch has long asserted the inherent authority of the President to make withdrawals, and some significant withdrawals have been accomplished by executive order. Prior to 1976, congressional acquiescence in the executive's assertions of an implied power of withdrawal was seen as confirming the power's existence. United States v. Midwest Oil Co., 236 U.S. 459 (1915); Portland General Electric Co. v. Kleppe, 441 F. Supp. 859 (D. Wyo. 1977); 40 Op. Att'y Gen. 73 (1941). In an uncodified section of the FLPMA, § 704(a), 90 Stat. 2792, Congress expressly repealed "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress." However, the FLPMA was prospective only, preserved all existing executive withdrawals (id. § 701(c), 90 Stat. 2786), and gave the Secretary of the Interior express new withdrawal authority to be exercised in accordance with statutory procedures (id. § 204, 43 U.S.C. § 1714).[4]

An exception to the FLPMA withdrawal authority is 43 U.S.C. § 156, under which a withdrawal or reservation of public land of more than 5,000 acres "for any one defense project or facility of the Department of Defense" requires an act of Congress. The 1958 enactment of 43 U.S.C. § 156, like FLPMA itself nearly 20 years later, was prospective only and did not invalidate prior withdrawals by executive action. Mollohan v. Gray, 413 F.2d 349 (9th Cir. 1969).

The last significant body of federal land subject to disposal is in Alaska. Under several statutes,[5] much federal land in Alaska will ultimately be conveyed to the state of Alaska and to Alaska natives. A discussion of this process may be found in a GAO report entitled

[4] A brief summary of these developments may be found in Lujan v. National Wildlife Federation, 497 U.S. 871, 875-79 (1990). For a more detailed discussion, see David H. Getches, Managing the Public Lands: The Authority of the Executive to Withdraw Lands, 22 Natural Resources Journal 279 (1982).

Alaska Land Conveyance Program—A Slow, Complex, and Costly Process, GAO/RCED-84-14 (June 12, 1984).

Today, all federally owned land, regardless of the specificity with which it has been withdrawn and reserved, is under the jurisdiction of some federal agency.[6] Four agencies—the Departments of the Interior, Agriculture, Energy, and Defense—manage approximately 99 percent of federally owned land. Interior has jurisdiction of by far the greatest portion, approximately two-thirds. Within Interior, the bureaus with the greatest land responsibilities are the National Park Service (national parks and monuments), the Fish and Wildlife Service (National Wildlife Refuge System), the Bureau of Reclamation (reclamation water projects), and the Bureau of Land Management.

The lands managed by the Bureau of Land Management (BLM), comprising nearly half of all federal land, are the most difficult of all to describe. As the policy of disposal galloped along during the 19th century, much of the public domain that was best suited for uses such as farming and timber was quickly put to these uses. What was left was used mostly for grazing. Under the "benign neglect" of the time, use too often became overuse and abuse. The land was withdrawn from the public domain by a series of statutes and executive orders starting with the Taylor Grazing Act in 1934. When the BLM was established in 1946, it received jurisdiction over this land. For lack of a better designation, the lands are best referred to by the simple if nondescriptive term "BLM lands." Much of the emphasis of federal land management in the future will center around these "BLM lands."

The Forest Service, Department of Agriculture, has jurisdiction over the approximately 25 percent of federal land which comprises the National Forest System. The Department of Energy controls property acquired, mostly during the World War II and Cold War

[5]Alaska Statehood Act, 48 U.S.C. note prec. § 21; Alaska Native Claims Settlement Act, 43 U.S.C. ch. 33; Alaska National Interest Lands Conservation Act, 16 U.S.C. ch. 51.

[6]Real property management in the executive branch is outlined in capsule form in Exec. Order No. 12512 (April 29, 1985), 3 C.F.R. at 340 (1985), reprinted in 40 U.S.C. § 486 note.

eras, in connection with the development, production, and testing of nuclear weapons.

The Defense Department has jurisdiction over a small (approximately 3 percent) but important segment consisting of defense installations and civil water projects managed by the Army Corps of Engineers.

An agency with control over only a tiny percentage of federal land but with major responsibilities is the General Services Administration. GSA has a variety of functions under the Federal Property and Administrative Services Act of 1949 and the Public Buildings Act of 1959, some of which will be described later in this chapter. In terms of the work space in which federal agencies carry out the day-to-day functions of government, GSA is the "government's landlord."

A term we have already encountered on several occasions is the "public domain." Although the term is still commonly used, in the traditional sense of "open land"—federal land you could obtain for homesteading or upon which you could graze your cattle (and, in the grand tradition of classic American westerns, chase off those pesky farmers and sheepherders) free from regulation—the "public domain" no longer exists.

A related term is "public lands." There is a common-law definition and a statutory definition. The common-law definition is lands which are subject to sale or other disposal under the general land laws of the United States. Newhall v. Sanger, 92 U.S. 761, 763 (1875); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 602 (9th Cir. 1981); United States v. Kipp, 369 F. Supp. 774, 775 (D. Mont. 1974); 19 Comp. Gen. 608, 611 (1939). The courts have tended to regard "public domain" as synonymous with "public lands" as defined by Sanger and its progeny. E.g., Barker v. Harvey, 181 U.S. 481, 490 (1901); United States v. Holliday, 24 F. Supp. 112, 114 (D. Mont. 1938). The statutory definition is found in section 103(e) of the FLPMA, 43 U.S.C. § 1702(e). For purposes of the FLPMA, "public lands" means, with certain exceptions, "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership," in other words, what we earlier referred to as the "BLM lands." The relationship between the statutory and common-law definitions is not without controversy. Compare Columbia Basin, 643 F.2d at 601-602 (FLPMA essentially incorporated the traditional definition) with Sierra Club v. Watt, 608 F. Supp. 305, 336-338 (E.D. Cal. 1985) (strongly suggesting that its governing circuit's Columbia Basin decision was incompatible with prevailing Supreme Court precedents).

Nothing in life is static. The federal government will continue to acquire land and it will continue to dispose of land. However, apart from the eventual transfer of the Alaska lands, the massive acquisitions and disposals of earlier times appear unlikely to recur. The emphasis is now, and will almost certainly remain, on the complex issues of classification, economic use, and conservation—in brief, on public land management.[7]

B. Acquisition of Real Property for Government Use

If the federal government needs private property, it will normally try to acquire it in the same manner as a private citizen, through negotiation and purchase. Purchase negotiations, however, do not always succeed. The parties may be unable to agree on the price, or perhaps the owner wants to impose conditions that the acquiring agency thinks are unacceptable. In such a situation, the government always holds the ultimate trump card—the power of eminent domain.

Eminent domain is one of the government's most far-reaching powers, and GAO has cautioned against its overzealous application. See The Federal Drive to Acquire Private Lands Should Be Reassessed, GAO/CED-80-14 (December 14, 1979). In reviews of particular programs, GAO has been critical of excessive and unnecessary land acquisition by the federal government and has recommended in such instances that the land be returned to private ownership. E.g., Lands in the Lake Chelan National Recreation Area Should Be Returned to Private Ownership, GAO/CED-81-10 (January 22, 1981); The National Park Service Should Improve Its

[7] Although GAO has been active in these areas from the audit perspective, they are beyond the scope of this publication. For a summary presentation of some of the issues and problem areas, see Land Use Issues: A GAO Perspective, GAO/CED-82-40 (February 25, 1982).

Land Acquisition and Management at the Fire Island National Seashore, GAO/CED-81-78 (May 8, 1981).

1. The Fifth Amendment

Any discussion of property acquisition by the United States must start with the "eminent domain clause" of the Fifth Amendment to the United States Constitution. As relevant here, the Fifth Amendment says that no person shall be deprived of life, liberty, or property without due process of law, "nor shall private property be taken for public use, without just compensation."

The Fifth Amendment is not an affirmative grant of the power to take private property. The Supreme Court has noted on many occasions that the power of eminent domain is inherent in the sovereign. It is a necessary incident or attribute of sovereignty and needs no specific grant in the Constitution or elsewhere. E.g., Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 681 (1896); United States v. Jones, 109 U.S. 513, 518 (1883). More recently, the Court noted in United States v. Carmack, 329 U.S. 230, 241-242 (1946), that the Fifth Amendment tacitly recognizes a preexisting power to take private property for public use. Thus, the Fifth Amendment is not the source of the government's power of eminent domain. Rather, it is a limitation on the use of that power.[8]

While consent of the state in which the land is located may be relevant to the type of jurisdiction the federal government acquires (see discussion under the Federal Enclave heading later in this chapter), the acquisition of land requires no such consent unless Congress has expressly provided otherwise. North Dakota v. United States, 460 U.S. 300, 310 (1983); Kohl v. United States, 91 U.S. 367, 374 (1876). Examples of statutes requiring state consent are 16 U.S.C. §§ 515 (national forest system acquisitions under the Weeks Act) and 715f (Migratory Bird Conservation Act).[9]

[8]However, the fact that the United States has the inherent power of eminent domain does not mean that any federal agency can exercise it without further authority. The need for statutory authority will be discussed later.

[9]Cases discussing and applying the requirement of the Migratory Bird Conservation Act include United States v. 1,216.83 Acres, 573 F.2d 1054 (9th Cir. 1978); Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967).

Issues arising under the Eminent Domain Clause can be grouped under three major headings:

(1) What is a "taking" for purposes of the Fifth Amendment? The concept of "taking" is not limited to acts which result in the transfer of title or possession, but has been construed to embrace a wide variety of government actions. Examples noted, with case citations, in our discussion of inverse condemnation claims in Chapter 12 include permanent flooding, the taking of "air easements" (noise from overhead flights), and regulatory taking. Regardless of the type of taking involved, the purpose of the eminent domain clause of the Fifth Amendment is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960), quoted in Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211, 227 (1986).

(2) What is a "public use"? Contrary to what the words may seem to imply, "public use" does not mean for use by, or accessible to, members of the general public. According to the Supreme Court, virtually anything the Congress is empowered to do is a "public use" sufficient to invoke the power of eminent domain. E.g., Berman v. Parker, 348 U.S. 26, 33 (1954).

(3) What constitutes "just compensation"? As a general proposition, just compensation is the fair market value of the property at the time of the taking. It is the price a willing and knowledgeable buyer would pay to a willing and knowledgeable seller, both free from mistake or coercion, without regard to increases or decreases attributable to the project for which the property is being acquired. E.g., United States v. Reynolds, 397 U.S. 14 (1970); United States v. Miller, 317 U.S. 369, 376-77 (1943). See also 18 Comp. Gen. 245 (1938); B-193234, December 8, 1978.

The federal power of eminent domain extends to Indian tribal lands. E.g., United States v. 21,250 Acres of Land in Cattaraugus County, 161 F. Supp. 376 (W.D. N.Y. 1957). It also extends to land owned by states. Oklahoma ex rel. Phillips v. Atkinson, 313 U.S. 508, 534 (1941). The Supreme Court has said that the term "private property" in the Fifth Amendment encompasses the property of state and local governments, and that the same principles of just compensation presumptively apply. United States v. 50 Acres, 469 U.S. 24, 31

(1984). The rules may differ, however, in the case of properties, such as roads, which are normally not bought and sold in the open market. Id. at 30.

Each of these issues has generated a raft of litigation, with the scope of the regulatory taking concept being particularly active. Further detail is beyond our present scope and our statements above are intended to do nothing more than suggest the applicable principles.[10]

2. Federal Land Acquisition Policy

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, became law on January 2, 1971, and was amended in 1987. The major portion of the law, Title II, deals with relocation assistance and will be covered later in this chapter. Title III, 42 U.S.C. §§ 4651-4655, is entitled "Uniform Real Property Acquisition Policy." The policy provisions of Title III are independent of the relocation provisions of Title II and apply regardless of whether anyone will be displaced by the acquisition. City of Columbia, South Carolina v. Costle, 710 F.2d 1009 (4th Cir. 1983).

The main section for our purposes is section 301, 42 U.S.C. § 4651. It begins by stating four congressional objectives: (1) to encourage and expedite acquisition by voluntary rather than involuntary means,
(2) to avoid litigation and thereby reduce congestion in the courts (ha!), (3) to assure consistent treatment of property owners, and (4) to promote public confidence in federal land acquisition practices.

Section 301 then goes on to state 10 congressional "policies," designated as subsections (1) through (10). They are:

(1) Agencies should make "every reasonable effort" to acquire property by negotiated sale before resorting to involuntary acquisition. This of course does not mean that the negotiations must succeed. What it means is that the agency is expected to negotiate reasonably and in good faith. See B-179059, October 11, 1973.

[10]A useful starting point for further exploration is Robert Meltz, Library of Congress, When the United States Takes Property: Legal Principles, CRS No. 91-339 A (1991).

A device the National Park Service has used to encourage voluntary sale when acquiring single-family residential property is to permit the owner to retain a "right of use and occupancy" for a specified term of years or for the life of the owner and spouse. The owner pays a fee for this retained interest, determined actuarially in the case of a life estate, which is deducted from the purchase price. The fee has traditionally been set below market as an additional inducement. The device, primarily from the valuation perspective, is discussed in B-125035-O.M., May 7, 1976.

(2) Property should be appraised before the negotiations start, and the owner should be given the opportunity to accompany the appraiser during the inspection. The agency may waive the appraisal for property with a "low fair market value," undefined in the statute but set at $2,500 or less in the governmentwide regulations published by the Department of Transportation.
49 C.F.R. § 24.102(c)(2).

To the extent appropriate, appraisals should follow the Uniform Appraisal Standards for Federal Land Acquisitions published by the Interagency Land Acquisition Conference (Washington, D.C. U.S. Government Printing Office, 1973). Id. § 24.103(a).

(3) Subsection (3), dealing with the amount of compensation, includes several distinct points:

- The acquiring agency should establish the "just compensation" amount before the negotiations start.
- This amount should not be less than the agency's approved appraisal.[11]
- The negotiations should start with an offer of this amount.
- The acquiring agency should provide the owner with a written statement summarizing the basis for the amount offered.
- Increases or decreases in fair market value attributable to the federal project or to the likelihood of acquisition are to be

[11]What if the agency thinks the appraisal is excessive? The House Public Works Committee cautioned: "If the amount of just compensation as determined by the head of the Federal agency is less than the agency's approved appraisal, it would appear that an in-depth review of the methods employed in determining the amount of just compensation or in making the appraisal is called for." H. R. No. 91-1656, at 23 (1970), reprinted in 1970 U.S.C.C.A.N. 5850, 5872.

disregarded. (This, as we have seen, was a codification of existing case law. See the discussion of what constitutes "just compensation," above.)

The legislative history emphasizes that genuine negotiations are expected rather than a "take it or leave it" (or perhaps more appropriately, "take it or we'll condemn it anyway") approach. H.R. No. 91-1656, at 22 (1970), reprinted at 1970 U.S.C.C.A.N. 5850, 5871-72.

Subsection (3) is designed to be fair both to the property owner and to the taxpayer. Thus, although the statute contemplates that the ultimate purchase price might end up higher than the agency's appraisal, the property owner should not receive a windfall. B-193234, December 8, 1978. Also, as long as there is no pressure or coercion, there is nothing to prevent an owner from agreeing to accept less than the government's initial offer. 58 Comp. Gen. 559, 566 (1979); B-148044, December 9, 1976.

Where the wrong amount is paid through mutual mistake, the negotiations may be reopened to effect an appropriate adjustment. The decision B-197623, June 4, 1980, involved acquisitions by the National Park Service under the Wild and Scenic Rivers Act of 1968. After some land had been acquired, it was discovered that two states in which the acquired lands were located had passed certain zoning restrictions which resulted in lowering property values. Since the zoning restrictions were viewed as a consequence of the federal project, the reduction in value should have been disregarded. The Comptroller General agreed that the Park Service could reopen the transactions and reappraise the property using the proper criteria.

If there is a substantial delay between the appraisal and the acquisition, the agency should consider updating the appraisal or getting a new one. H.R. No. 91-1656 at 23; B-193234, December 8, 1978.

The Uniform Relocation Act applies to the acquisition of easements as well as the acquisition of fee simple title. If the taking of an easement benefits the remainder of the landowner's property, the accruing benefit may be set off against the value of the property interest actually taken. If these accruing benefits exceed the value of the easement taken, there is no requirement for additional monetary compensation. 58 Comp. Gen. 559 (1979). A case discussing application of several of the policy elements to the acquisition of scenic easements under the Wild and Scenic Rivers Act is B-179059, October 11, 1973.

(4) The owner should not be required to surrender possession until the agency has either (a) paid the agreed purchase price, in the case of a negotiated purchase, or (b) deposited the appropriate amount in with the court, in the case of a condemnation.

(5) Insofar as possible, no person lawfully occupying real property (residence, business, or farm) should be required to move without at least 90 days' written notice.

(6) If the acquiring agency permits an owner or tenant to remain on the premises on a rental basis, rent should not exceed the property's fair rental value.

(7) The acquiring agency should take no action (e.g., advance or defer the time of condemnation) to coerce or compel an agreement as to price.

(8) If involuntary acquisition becomes necessary, the agency should institute formal condemnation proceedings. An agency should never intentionally make it necessary for the property owner to go to court to establish the taking under an inverse condemnation theory.

(9) If the agency needs only part of the property but partial acquisition would leave the owner with an uneconomic remnant, the agency should offer to acquire the entire property. The statute defines "uneconomic remnant" as a remaining interest which the acquiring agency determines "has little or no value or utility to the owner."

(10) An owner who has been "fully informed of his right to receive just compensation" may choose to donate all or part of the property to the government.

These, then, are the elements of federal land acquisition policy. Always on the lookout for catchy phrases, we would be tempted to refer to 42 U.S.C. § 4651 as the "property owner's bill of rights," except for one thing—section 4651 does not create any rights. Another provision of the Uniform Relocation Act, section 102,

42 U.S.C. § 4602, provides:

"(a) The provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisition by purchase or condemnation.

"(b) Nothing in this chapter shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to January 2, 1971."

By virtue of 42 U.S.C. § 4602, the 10 policy elements of 42 U.S.C. § 4651 are guidelines only. There is a considerable body of case law to the effect that section 4651 does not create rights in favor of property owners which are enforceable in court. E.g., Rhodes v. City of Chicago, 516 F.2d 1373 (7th Cir. 1975); Boston v. United States, 424 F. Supp. 259 (E.D. Mo. 1976); Nall Motors, Inc. v. Iowa City, 410 F. Supp. 111 (S.D. Iowa 1975), aff'd, 533 F.2d 381 (8th Cir. 1976); Barnhart v. Brinegar, 362 F. Supp. 464 (W.D. Mo. 1973).[12] If the statute did not create rights enforceable in court, it followed that GAO could not consider monetary former claims for alleged violations of section 4651 under its former claims settlement authority. B-215591, September 5, 1984.

The policy elements of 42 U.S.C. § 4651 are intended to apply to federally funded state acquisitions as well as to direct federal acquisitions. Federal agencies are directed by 42 U.S.C. § 4655 not to approve any grant, contract, or agreement to or with a state agency under which federal money will be available for all or any part of any program or project which will result in the acquisition of real property, unless the state agency provides "satisfactory assurances"

[12] See also Paramount Farms, Inc. v. Morton, 527 F.2d 1301 (7th Cir. 1975); United States v. 416.81 Acres, 525 F.2d 450 (7th Cir. 1975); Bunker Properties, Inc. v. Kemp, 524 F. Supp. 109 (D. Kan. 1981); Nelson v. Brinegar, 420 F. Supp. 975 (E.D. Wis. 1976); Rubin v. HUD, 347 F. Supp. 555 (E.D. Pa. 1972); Will-Tex Plastics Manufacturing, Inc. v. HUD, 346 F. Supp. 654 (E.D. Pa. 1972), aff'd mem., 478 F.2d 1399 (3d Cir. 1973).

that it will "be guided, to the greatest extent practicable under State law," by the policies of section 4651.[13]

One court has found that, although the policy elements of 42 U.S.C. § 4651 are not binding in and of themselves, they may become binding if included in a contract. The Department of Housing and Urban Development entered into a "contract" with a county for a grant under the Housing Act. In the agreement, the county represented that it would follow the policies of 42 U.S.C. § 4651. Plaintiffs alleged that the county failed to follow several of the policy elements, for example, by not giving some owners the opportunity to accompany the appraisers during their inspection. The court found that the plaintiff-landowners were "donee third party beneficiaries" of the contract between HUD and the county. The court therefore enjoined the county from prosecuting condemnation proceedings, and enjoined HUD from providing any federal money, until the county complied with the items found to be in violation. Bethune v. United States, 376 F. Supp. 1074 (W.D. Mo. 1972).

We mention the Bethune case because it has never been overruled. It is, however, of doubtful precedential value. The same court (different judge) rejected the third-party beneficiary theory a year later, without mentioning Bethune, in Barnhart v. Brinegar, cited above. The Barnhart case, because of its exhaustive analysis of legislative history, has become one of the leading cases in the area. Courts which have considered both cases have rejected Bethune and followed Barnhart. E.g., Boston v. United States, 424 F. Supp. at 264-265; Nall Motors v. Iowa City, 410 F. Supp. at 114-115.

3. Need for Statutory Authority

Before any federal agency can purchase real property, it must have statutory authority. Congress originally enacted this requirement in 1820 (3 Stat. 568), and it is found today, unchanged, in 41 U.S.C. § 14:

> "No land shall be purchased on account of the United States, except under a law authorizing such purchase."

[13]Title II of the Uniform Relocation Act contains a similar provision with the "satisfactory assurances" language. That provision is noted later in this chapter with case citations to the effect that a satisfactory assurance does not mean a guarantee.

This is one of the oldest principles of our government. The Attorney General said well over a century ago that "[t]here never was a time in the history of this Government when the purchase of land on account of the United States without authority of law was a legal act on the part of the Executive." 11 Op. Att'y Gen. 201, 203 (1865). A similar requirement is found in 10 U.S.C. § 2676(a), applicable to the military departments.

As discussed below, not all acquisitions are subject to 41 U.S.C. § 14. Where the statute does not apply, the authority for the expenditure is determined "in accordance with the usual rules of appropriation law construction," that is, by applying the necessary expense theory of purpose availability. 38 Comp. Gen. 782, 785 (1959); B-12021, September 7, 1940.

a. Applicability

The requirement of 41 U.S.C. § 14 applies to acquisition by condemnation as well as acquisition by voluntary purchase. 41 Comp. Gen. 796 (1962). Condemnation is essentially an enforced sale; the government is still a "buyer." This does not mean that the authorizing statute must specify "condemnation." As we will see later, a statute authorizing purchase is sufficient. To restate, although the statute need not specify condemnation, there must be a statute.

Several decisions have established that 41 U.S.C. § 14 applies not only to the acquisition of fee simple title, but also to the acquisition of lesser estates or interests in land, such as permanent easements or rights-of-way. 17 Comp. Gen. 204 (1937); 21 Comp. Dec. 326 (1914); B-55105, February 26, 1946; A-88061, August 3, 1937; A-31494, May 8, 1930; A-24745, October 13, 1928. Looking at it from another angle, the purchase of a permanent easement or right-of-way over land constitutes the purchase of land for purposes of 41 U.S.C. § 14.

The statute applies as well to the acquisition of a leasehold. 39 Op. Att'y Gen. 56 (1937); 28 Op. Att'y Gen. 463 (1910). This includes acquisition for consideration other than money as long as the consideration is more than nominal. 35 Op. Att'y Gen. 183 (1927). A lease will normally place the lessee under an obligation, upon termination of the lease, to restore the property to the condition it was in when the lease began. A federal agency in temporary occupancy of real property under such an obligation cannot purchase (or condemn) the property unless 41 U.S.C. § 14 has been satisfied, even though acquiring fee title would be cheaper than restoration. 24 Comp. Gen. 339 (1944). See also 26 Comp. Dec. 242 (1919).

The statute applies to the acquisition of new land, not to land already owned by the government. Thus, it does not apply to the transfer of excess property to another agency under the Federal Property and Administrative Services Act of 1949. 38 Comp. Gen. 782 (1959). See also B-71849, January 7, 1948, reaching the same conclusion under an earlier statute that was superseded by the 1949 act. The Attorney General has also concluded that 41 U.S.C. § 14 does not apply to authorized interagency transfers. 40 Op. Att'y Gen. 483 (1946).

The statute has also been held inapplicable to transactions in the nature of "unvouchered expenditures." 9 Comp. Dec. 805 (1903).

(1) Debt security

The statute does not prevent acquisition of land where acquired as security for a debt, nor does it apply to collecting debts by resort to security. In this connection, the Supreme Court has said:

> "[I]n our judgment [41 U.S.C. § 14] does not prohibit the acquisition by the United States of the legal title to land, without express legislative authority, when it is taken by way of security for a debt. . . . To deny [appropriate government officials] the power to take security for a debt on account of the United States, according to the usual methods provided by law for that end, would deprive the government of a means of obtaining payment, often useful, and sometimes indispensably necessary. That such power exists as an incident to the general right of sovereignty, and may be exercised by the proper department if not prohibited by legislation, we consider settled . . . ." Neilson v. Lagow, 53 U.S. (12 How.) 98, 107 (1851).

See also Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886); 35 Op. Att'y Gen. 474 (1928).

Citing Neilson v. Lagow, the Comptroller General held in 34 Comp. Gen. 47 (1954) that 41 U.S.C. § 14 did not preclude the Secretary of Agriculture from protecting the government's interests under a second mortgage, either by bidding at a prior lienholder's foreclosure sale, or, if the prior lienholder foreclosed, by redeeming the property under state law. Once it was determined that 41 U.S.C. § 14 did not stand in the way and that there was no other applicable prohibition, the question was simply one of applying the necessary expense theory of purpose availability—the Secretary could make the expenditure if it was administratively determined to be in reasonable furtherance of the relevant appropriation. See also 36 Comp. Gen. 697 (1957).

(2) Donated property/funds

An early decision held that 41 U.S.C. § 14 does not apply to land donated to the United States, provided that the donation does not involve an expenditure of public funds. 19 Comp. Dec. 1 (1912). In reaching this conclusion, the Comptroller of the Treasury cited two 1910 opinions of the Attorney General reaching the same result, 28 Op. Att'y Gen. 413 and 28 Op. Att'y Gen. 463. In the former opinion, the Attorney General expressed the view that the phrase "on account of the United States" as used in 41 U.S.C. § 14 means the same thing as "at the expense of" or "to be paid for by" the United States. 28 Op. Att'y Gen. at 416.

If an agency has authority to accept donations of land and of money, it may use donated funds to purchase land, without regard to 41 U.S.C. § 14, if the funds were donated for the same general purpose for which the land is desired. 2 Comp. Gen. 198 (1922). In that case, the state of Colorado donated a sum of money to the Interior Department for "general park purposes" in the Rocky Mountain National Park. Interior has authority, now found at 16 U.S.C. § 6, to accept land or money donated for the purposes of the national park and monument system. GAO advised that Interior could use the donated funds to purchase a tract of land within the park boundaries which was needed as a site for park administration and maintenance buildings, without the need for further statutory authority. See also B-40087, February 28, 1944.

(3) Options

An option to purchase land is an agreement in which the owner of the land gives a prospective buyer the right to purchase the land at a fixed price within a stated time period. The party receiving the option is under no obligation to exercise it. If consideration is given, the option is binding. If there is no consideration, the owner may revoke the option at any time prior to its exercise. An option may be viewed as a "continuing offer" to sell. The offer is accepted by exercise of the option within the time period for which it was granted. Purchase options may be advantageous to the government as a means of inhibiting price escalation.

A purchase option is not the purchase of land or an interest in land. Thus, 41 U.S.C. § 14 does not apply to the acquisition of an option, although it does apply to the exercise of the option. 38 Comp. Gen. 227 (1958); 36 Comp. Gen. 48 (1956).

Notwithstanding the nonapplicability of 41 U.S.C. § 14, other decisions have held that appropriated funds may not be used to acquire an option without statutory authority. A-17267, June 28, 1927; 9 Comp. Dec. 569 (1903).[14] The prohibition has not been applied to options given without monetary consideration. See, e.g., B-103967, July 7, 1972; A-59458, January 15, 1935.

When you combine these two concepts—the need for statutory authority and the nonapplicability of 41 U.S.C. § 14—the result is that you need statutory authorization to use appropriated funds to acquire an option on land, but it does not have to be tied in to the particular transaction. Several agencies have obtained statutory authority to acquire options. Examples are:

- 7 U.S.C. § 428a(b): The Department of Agriculture may acquire purchase options on land. Specific authority is needed if the cost of the option is more than $1.
- 10 U.S.C. § 2677: Military departments may acquire options on real property at a cost of not more than 12 percent of the property's appraised fair market value.
- 16 U.S.C. § 460l-10b: The Interior Department may acquire options on land to be included in the national park system, up to a maximum aggregate cost of $500,000 per year. The option must be for a minimum of two years, and the option cost must be credited toward the purchase price.
- The General Services Administration receives the authority in annual appropriation acts by virtue of language making the Federal Buildings Fund appropriation available for "acquisition of options to

[14]The rationale of the decisions is not consistent. The 1927 GAO decision was based on the purpose restriction of 31 U.S.C. § 1301(a). The 1903 decision of the Comptroller of the Treasury used as its rationale an interpretation of the advance payment statute, 31 U.S.C. § 3324.

purchase buildings and sites." E.g., Pub. L. No. 103-329, 108 Stat. 2382, 2397 (1994) (fiscal year 1995).

A purchase option may be acquired by itself or it may be included in a lease. The decisions in this area do not appear to have applied the statutory authority requirement to options included in leases, although we could find no clear statement. Where inclusion of an option is authorized, it may provide for its exercise at the end of the basic term of the lease, at the end of any renewal term, or at staggered periods during the basic term or any renewal term. B-137279, November 10, 1958, amplifying 38 Comp. Gen. 227 (1958). Lease transactions present their own complications and are treated separately later in this chapter.

(4) Indian tribal funds

Indian tribal funds are trust funds administered by the Bureau of Indian Affairs. The purchase of land from Indian tribal funds is not a purchase "on account of the United States." Thus, 41 U.S.C. § 14 does not apply, even where title to the land is to vest in the United States to be held in trust for the particular tribe. 19 Comp. Gen. 175 (1939); 5 Comp. Gen. 661 (1926). See also B-126095, March 7, 1956; A-51705, November 12, 1942.

b. Types of Statutory Authority

(1) Express versus implied authority

For the most part, land acquisition authority tends to be unmistakably explicit—that is, it will contain language such as "purchase land" or "acquire land." This is of course preferable, but it is not absolutely required. It is clear from the decisions, both administrative and judicial, that 41 U.S.C. § 14 may be satisfied by implication to a limited extent. The question seems to have arisen most often in connection with the construction of various facilities or public improvements. Given the existence of 41 U.S.C. § 14, deriving authority to purchase land by implication requires a somewhat more rigid test than the "reasonable relationship" standard used under the necessary expense theory. Responding to the question of whether congressional authorization for construction carries with it the implied authority to acquire land, the Comptroller General stated the test as follows in B-115456, July 16, 1953:

"[W]hile each individual case must of necessity be determined on the basis of the specific facts and circumstances pertaining thereto, an authorization for construction may be deemed to imply authority to acquire land therefor when such land is so necessary and essential for that construction that the acquisition thereof must have been contemplated by the Congress."

In determining whether authority to purchase land may be derived by implication, it is relevant to examine any pattern Congress may have developed in similar legislation. To illustrate, in 7 Comp. Dec. 524 (1901), something called the "Fish Commission" had an appropriation for the "erection of buildings" in connection with the establishment of a fishery station. The Commission wanted to know if it could use the appropriation to purchase land for the station. The Comptroller of the Treasury noted that a pretty good case could be made based on that appropriation standing alone. However, the Comptroller also noted that "the country is dotted with stations established by virtue of acts of Congress" (id. at 525), and that these other statutes almost invariably included the specific authority to purchase land. Viewing this particular appropriation in light of the established pattern in similar statutes, the Comptroller concluded that the purchase of land was not authorized. See also 2 Comp. Gen. 558, 560 (1923); B-115456, July 16, 1953.

Other authorities supporting the proposition that the authority required by 41 U.S.C. § 14 may be derived by implication in appropriate circumstances include United States v. Threlkeld, 72 F.2d 464 (10th Cir. 1934), cert. denied, 293 U.S. 620; Burns v. United States, 160 F. 631 (2d Cir. 1908); 21 Comp. Dec. 326, 328 (1914); 11 Comp. Dec. 132 (1904); B-34805, June 15, 1943; 40 Op. Att'y Gen. 69 (1941).

(2) Forms of express authority

It was long ago recognized that no "specific formula of language" is required to authorize land acquisition. 11 Comp. Dec. 132, 139 (1904). To meet the varying needs of different agencies and programs, Congress has used a number of different statutory configurations to confer land acquisition authority.

Some agencies have general land acquisition authority in the form of permanent provisions found in the U.S. Code which may be agencywide or limited to a particular bureau or program. Examples are:

- 38 U.S.C. § 2406: authorizes Department of Veterans Affairs to acquire land for national cemeteries;
- 38 U.S.C. § 8103(a)(1): authorizes Veterans Affairs to acquire land for medical facilities;
- 40 U.S.C. §§ 602, 603(a), 604(a): authorize General Services Administration to acquire land for purposes of Public Buildings Act of 1959;
- 42 U.S.C. § 1502(b): authorizes acquisition of land for defense housing by Departments of Army, Navy, Air Force, and Housing and Urban Development; and
- 42 U.S.C. § 2473(c)(3): general land acquisition authority for the National Aeronautics and Space Administration.

These statutes make no mention of funding. Since they do not authorize the incurring of obligations in advance of appropriations, specific acquisitions under them must be funded through the normal budget and appropriations process. While acquisitions under these statutes are dependent upon the availability of appropriations, there is no general legal requirement that there also be a specific authorization of appropriations. B-173832, July 16, 1976; B-173832, August 1, 1975. GAO stressed in both of these letters that it was venturing no opinion as to whether a point of order might lie, but was addressing only the legality of the appropriation if enacted.

A variant includes a general reference to the availability of appropriations. An example is 7 U.S.C. § 428a(a), which authorizes the Department of Agriculture to acquire land "as may be necessary to carry out its authorized work," but only when provided for "in the applicable appropriation or other law." As with 41 U.S.C. § 14 itself, this statute has been construed as not applying to land already owned by the government. 38 Comp. Gen. 782, 784-85 (1959).

Another example is 14 U.S.C. § 92(f), which provides general land acquisition authority for the Coast Guard "for which an appropriation has been made." This too requires an appropriation which is itself available for land acquisition. B-148989-O.M., June 18, 1962 (at the time of this opinion, section 92(f) read, "within the limits of appropriations made therefor"). A third example is 43 U.S.C. § 36b, which authorizes the Secretary of the Interior to purchase land for use by the Geological Survey in "gaging" streams "when funds have been appropriated by Congress." There is little substantive difference between this variant and the statutes previously noted because a general reference to the availability of appropriations merely serves to emphasize what the law requires anyway.

Another variant includes an authorization of appropriations. These tend to be specific program statutes, and the authorization may include restrictions as well as monetary authorizations. Examples are:

- 16 U.S.C. § 1246(e): authorizes land acquisition by the Departments of Agriculture and the Interior to implement the National Trails System Act. The authorization of appropriations is found in 16 U.S.C. § 1249.
- 16 U.S.C. § 1277(a): authorizes land acquisition by the Departments of Agriculture and the Interior to implement the Wild and Scenic Rivers Act. The authorization of appropriations is found in 16 U.S.C. § 1287. The provision is discussed generally in B-125035-O.M., May 21, 1979.

Once again, an actual acquisition requires an available appropriation, in this case one made pursuant to the authorization.

Another form of legislative authority is a statute which authorizes land acquisition and identifies the appropriation to be charged. An example is 10 U.S.C. § 2672a. The land acquisition needs of the military departments are usually addressed in the annual Military Construction Authorization Acts. However, if land is needed in the interest of national defense and to maintain the "operation integrity" of a military installation, and the urgency of the situation does not permit inclusion in the next authorization act, 10 U.S.C. § 2672a authorizes military departments to use military construction appropriations to acquire the land, with advance written notice to the pertinent congressional oversight committees. The military departments also have authority to use appropriations available for maintenance or construction to acquire any interest in land needed for national defense purposes and which does not cost more than $200,000. 10 U.S.C. §§ 2672, 2673.

Another statute of this type is 16 U.S.C. § 555, which authorizes the Secretary of Agriculture to purchase land for national forest headquarters, ranger stations, and other sites required for authorized activities of the Forest Service, up to a maximum of

$50,000 a year, chargeable not to a specifically named appropriation but to “the appropriation applicable to the purpose for which the land is to be used.” Decisions applying this statute are 6 Comp. Gen. 437 (1929) (an earlier version of the statute) and B-125390, October 6, 1955.

If you have one of these statutes, the only other thing you need is a sufficient amount of available funds in the appropriation to be charged.

A final category we may note consists of statutes which are essentially procedural and which GAO has viewed as not constituting sufficient authority for the purchase of land. Under these, you still need separate acquisition authority as well as an available appropriation. Examples are:

- 10 U.S.C. § 2663: gives the military departments what appears to be general condemnation and purchase authority. GAO’s view is that “this provision is procedural in nature and merely provides the method whereby land may be acquired where there exists a separate authorization to acquire and pay for such land.” B-115456, July, 16, 1953.
- 10 U.S.C. § 9773: GAO reached the same conclusion in the same decision with respect to this statute, which authorizes the Secretary of the Air Force to determine sites for establishment and enlargement of air bases, and to acquire fee simple title to any land deemed necessary for this purpose.
- 40 U.S.C. § 490(a)(12): land acquisition by the General Services Administration under the Federal Property and Administrative Services Act of 1949. GAO’s view of this provision as merely procedural was based on legislative history and an established congressional pattern of providing specifically for acquisitions by GSA. Even if the provision were regarded as general authority, acquisitions would still require available appropriations. B-137755-O.M., December 30, 1958.

It is apparent from our survey that Congress has used a variety of approaches to satisfy the basic requirement of 41 U.S.C. § 14. Typically, there is some form of authorization, general or specific, which is then implemented, with few exceptions, through the normal budget and appropriations process. The one constant is the need for an available appropriation. <u>See</u>, <u>e.g.</u>, 41 Comp. Gen. 796, 798

(1962); 38 Comp. Gen. 227, 229 (1958). Setting aside the question of whether such a provision would be subject to a point of order, authorization and appropriation could be combined in an appropriation act; that is, the appropriation itself could be the source of the acquisition authority. E.g., Polson Logging Co. v. United States, 160 F.2d 712, 714 (9th Cir. 1947). The appropriation does not have to specifically address the tract to be acquired. A lump-sum appropriation one of whose purposes is land acquisition will be sufficient if it can be demonstrated through legislative history, budget submission materials, etc., to be available for the specific acquisition in question. The case most often cited for this proposition is United States v. Kennedy, 278 F.2d 121 (9th Cir. 1960). See also United States v. Right to Use and Occupy 3.38 Acres, 484 F.2d 1140 (4th Cir. 1973) (Army research and development appropriation); Perati v. United States, 352 F.2d 788 (9th Cir. 1965), cert. denied, 383 U.S. 957 (1966) (National Park Service); Seneca Nation of Indians v. Bruckner, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959) (Corps of Engineers general construction appropriation); United States v. 0.37 Acres, 414 F. Supp. 470 (D. Mont. 1976) (Land and Water Conservation Fund).

An appropriation which itself provides for “purchase of land as authorized by law” will generally be ineffective without separate statutory authorization. 19 Comp. Gen. 758 (1940). However, authority sufficient to satisfy the basic requirement of 41 U.S.C. § 14, such as a lump-sum appropriation demonstrably available for the specific acquisition, will also satisfy the “authorized by law” language in the appropriation act. 3.38 Acres, 484 F.2d at 1142-43; 0.37 Acres, 414 F. Supp. at 471-472.

The terms of the legislation will define the extent of the agency’s acquisition authority. Naturally, the authority will be circumscribed by any restrictions contained in the legislation. E.g., Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

Similarly, depending on those terms, the agency may or may not be authorized to acquire less than fee title or fee title subject to various reservations or covenants. It has been held that the simple authority to purchase land does not include the authority to purchase that land subject to reservations or covenants restricting the use of the land (such as timber or mineral reservations) and which might impede subsequent sale or disposition by the government. 10 Comp.

Gen. 320 (1931); A-34970, February 20, 1931; A-25156, December 15, 1928. In addition, the Attorney General will probably not approve the title. See Justice Department regulations quoted at 6 Op. Off. Legal Counsel 431, 435-36 (1982) and 3 Op. Off. Legal Counsel 337, 339 (1979). Congress can, of course, authorize acquisition subject to reservations. See, e.g., 15 Comp. Gen. 910 (1936). The authority to acquire "lands, easements and rights-of-way" has been construed as such authority. 40 Op. Att'y Gen. 431 (1945). There are also nonstatutory exceptions based largely on common sense. Thus, where acquisition of land for a parkway would end up cutting a farmer's land in half, there could be no objection to his reserving the right to cross the parkway to get from one part of his farm to the other. A-34970, May 15, 1931. In another case, where the land to be acquired contained buildings which the government neither needed nor wanted, there was no objection to reserving title to the buildings in the vendor along with a requirement to remove them within a specified time. 22 Comp. Gen. 165 (1942).

In any event, care must be taken in this regard because acceptance of a deed subject to certain covenants may end up binding the government. E.g., Mississippi State Highway Commission v. Cohn, 217 So. 2d 528 (Miss. 1969) (covenant to construct cattle underpass); B-210361, August 30, 1983 (covenant to pay homeowners' association assessment).[15]

What the agency can or cannot do also depends on the scope of its acquisition appropriations, which in turn depends on the rules of statutory and appropriations law construction (purpose, time, and amount). For example, construction of the Bonneville Dam by the Army Corps of Engineers resulted in the flooding of certain Forest Service facilities. While the Army had appropriations to acquire land necessary for the Bonneville project, it could not use those funds to purchase land on which to relocate the Forest Service facility since those lands were not required for that project. 17 Comp. Gen. 791 (1938). The decision was based on two statutes: 31 U.S.C. § 1301(a), which restricts appropriations to their intended purposes, and

[15]This of course would not apply to illegal covenants like the infamous "white people only" covenant, an example of which is stated in 10 Comp. Gen. 320 (1931). The Justice Department advises that racial and religious covenants should simply be ignored because they are unenforceable. Regulations of the Attorney General Promulgated in Accordance With the Provisions of Public Law 91-393, § 5(d) (1970).

41 U.S.C. § 14 itself, since "such purchase"—purchase of land for use by another agency—had not been authorized. Similarly, the established rules regarding the exclusivity of specific appropriations apply equally to land acquisition appropriations. E.g., B-10122, July 28, 1950; B-10122, May 20, 1940.

c. Effect of Noncompliance

It will be apparent by now that our discussion of 41 U.S.C. § 14 has cited very few recent cases. The reason is that there are very few recent cases. Most issues under the statute are pretty well settled, and most agencies with significant land acquisition responsibilities have worked out the necessary legislative framework with their oversight committees. Perhaps at least in part because of this, there is very little authority on the question of what happens if an agency purchases or condemns land without having complied with 41 U.S.C. § 14.

One early case said that a purchase in contravention of 41 U.S.C. § 14 was void. United States v. Tichenor, 12 F. 415 (C.C.D. Ore. 1882). Tichenor cited an 1865 opinion of the Attorney General, 11 Op. Att'y Gen. 201 (which used the term "illegal," not "void"), and was in turn cited by the Comptroller of the Treasury in 6 Comp. Dec. 791, 793 (1900).

A 1908 case, Burns v. United States, 160 F. 631 (2d Cir. 1908), concluded, without citing Tichenor, that 41 U.S.C. § 14 "should not be construed to apply to executed contracts, and so the United States be prevented from claiming that for which it has paid." Id. at 634.

Our research has disclosed no indication that the issue has ever been addressed by the Comptroller General, by the Attorney General subsequent to the 1865 opinion, or by any court subsequent to Burns.[16]

[16]Burns was quoted for purposes of analogy in Nevada v. United States, 547 F. Supp. 776, 780 (D. Nev. 1982). While the decision was affirmed on appeal, 731 F.2d 633 (9th Cir. 1984), the court of appeals criticized that portion of the district court's opinion as unnecessary "dictum," and indicated that, had the district court gone much further, it would have vacated that portion of the opinion. Thus, the 1982 district court opinion cannot be viewed as especially helpful.

4. Title Considerations

a. Title Approval

When you as a private citizen bought your house, a major consideration, and one which you probably took pretty much for granted, was the assurance that the person you bought it from actually owned it. Suppose he didn't, or suppose there were "clouds" on the title you didn't know about, such as outstanding tax liens or judgment liens. You could very well be stuck. You might have a wonderful cause of action against the seller, assuming you could catch him and assuming he still had some money left. It should be obvious that this is an unacceptable risk. If you financed your house the way most of us do, with a mortgage, the bank did the worrying for you. Banks do not like to take unacceptable risks, and most of them aren't about to lend you money unless they're reasonably sure their investment is safe. This is why one of the things you paid for at closing was title insurance.

These same considerations are there when the government buys real estate. There is one important difference in that the government pays directly; it doesn't take out mortgages. Nevertheless, the government would indeed look stupid if it bought land from someone who didn't own it. More realistic possibilities are the acquisition of land which could not be used for the desired purposes, or the incurring of additional expenses to clear a defective title.

There is a statute designed to address this problem, 40 U.S.C. § 255. The statute consists of unnumbered paragraphs rather than subsections. The first two paragraphs are worth quoting:

> "Unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States, public money may not be expended for the purchase of the land or any interest therein.
>
> "The Attorney General may delegate his responsibility under this section to other departments and agencies, subject to his general supervision and in accordance with regulations promulgated by him."

The third paragraph provides that any agency which has been delegated title approval authority may still seek the assistance of, or request an opinion from, the Attorney General.

As with 41 U.S.C. § 14, the cases involving 40 U.S.C. § 255 tend to be older ones. There are few relevant GAO decisions from recent decades, and the statute is hardly mentioned in the published opinions of the Attorney General since 1940. This would tend to suggest that the operation of the statute is reasonably well settled.

The purpose of 40 U.S.C. § 255 is, quite simply, "to protect the United States against the expenditure of money in the purchase or improvement of land to which it acquired a doubtful or invalid title." 10 Op. Att'y Gen. 353, 354 (1862), quoted in 18 Comp. Gen. 727, 732 (1939). The statute assigns the responsibility to the Attorney General.[17] Thus, as far as the "accounting officers" are concerned, the Attorney General's opinion on the sufficiency of title under 40 U.S.C. § 255 is conclusive. 3 Comp. Dec. 195 (1896); B-78097, June 26, 1950. This would also be true with respect to the validity of mortgage releases upon which the Attorney General had conditioned his approval. 1 Comp. Dec. 348 (1895). For this reason, GAO has relied heavily on the opinions of the Attorney General when considering questions involving 40 U.S.C. § 255.

Prior to 1970, 40 U.S.C. § 255 was worded in terms of the purchase of land for the purpose of erecting public buildings. Thus, many early decisions centered around the use to which the land was to be put. E.g., 9 Comp. Gen. 75 (1929). However, the Attorney General, the Comptroller of the Treasury, and Comptroller General liberally construed the statute to apply to acquisitions for public works or public improvements of virtually any sort. Further, the fact that the acquiring agency did not intend to erect anything on the land was often viewed as irrelevant. See, e.g., 18 Comp. Gen. 727 (1939); 18 Comp. Gen. 372 (1938); 3 Comp. Dec. 530 (1897); B-80025, October 1, 1948; 39 Op. Att'y Gen. 73 (1937). So broad was this construction that early cases often stated the following general propositions:

[17]Within the Department of Justice, the implementation of 40 U.S.C. § 255 is the responsibility of the Environment and Natural Resources Division (formerly Land and Natural Resources Division). 28 C.F.R. § 0.66. That division has developed regulations (unpublished) outlining its standards for title approval, entitled Regulations of the Attorney General Promulgated in Accordance With the Provisions of Public Law 91-393 (1970). See 6 Op. Off. Legal Counsel 431 (1982); 3 Op. Off. Legal Counsel 337 (1979).

- 40 U.S.C. § 255 applies "to all land purchased by the United States for whatever purpose." 1 Comp. Gen. 625, 626 (1922); 9 Comp. Gen. 421, 422 (1930). Both decisions cite 28 Op. Att'y Gen. 413 (1910). See also 28 Op. Att'y Gen. 463 (1910).
- 40 U.S.C. § 255 "enters into, and forms part of" every contract for the purchase of land by the Government." 9 Op. Att'y Gen. 100, 101 (1857), cited in 1 Comp. Gen. 625, 626 and 9 Comp. Gen. 421, 422.

A 1970 revision of 40 U.S.C. § 255, Pub. L. No. 91-393, 84 Stat. 835 (1970), removed any doubt over the validity of these broad statements. The statute now refers simply to "the purchase of the land or any interest therein." The current view therefore remains that 40 U.S.C. § 255 applies in the absence of an express statutory exception. 6 Op. Off. Legal Counsel 431 (1982); 3 Op. Off. Legal Counsel 337 (1979).

As one might expect from the foregoing, 40 U.S.C. § 255 has been applied to a wide variety of situations. Examples are:

- Acquisitions under title III of the Bankhead-Jones Farm Tenant Act. 18 Comp. Gen. 727 (1939) (containing an extensive review of prior opinions of the Attorney General); 18 Comp. Gen. 372 (1938).
- Acquisitions under the Migratory Bird Conservation Act. 40 Comp. Gen. 153 (1960); 16 Comp. Gen. 856 (1937); 39 Op. Att'y Gen. 73 (1937).
- Land purchased for development into forest, grazing, and recreational areas and wildlife conservation refuges. 15 Comp. Gen. 539 (1935).
- Land acquired for public parks. See Cole v. United States, 28 Ct. Cl. 501, 511 (1893).
- Flowage easements acquired by the Corps of Engineers. B-139566, June 5, 1959.
- Acquisition by the Department of Energy of a "servitude" for the Strategic Petroleum Reserve under the Energy Policy and Conservation Act. 3 Op. Off. Legal Counsel 337 (1979).

The statute has been held applicable to purchases for nominal consideration,[18] to acquisition by donation,[19] and to acquisition by exercise of a purchase option.[20] One situation in which 40 U.S.C. § 255 has been found not applicable is monetary contributions by the Department of Defense for common-use NATO facilities financed under multilateral cost-sharing agreements. B-114107, April 27, 1953.

A number of early decisions concluded that 40 U.S.C. § 255 did not apply where an agency had specific authority to acquire land by purchase or condemnation. An example was the Reclamation Act of 1902. The theory was that such authority gave the acquiring agency discretion to either purchase or condemn, and incidentally to determine whether title was sufficiently clear to warrant purchase rather than condemnation. 10 Comp. Gen. 115 (1930); 5 Comp. Gen. 953 (1926); 12 Comp. Dec. 691 (1906); A-39589, December 30, 1931. The theory was discredited in 18 Comp. Gen. 727, 734-35 (1939) as not being "too strongly supported by reason." In case anybody missed the point, GAO, in agreement with the views of the Department of Justice, made it clear the following year that the old theory would no longer be applied. 19 Comp. Gen. 739 (1940). The reason, which we will cover later in this chapter, is that, since 1888, every agency with statutory authority to acquire land by purchase is also authorized to resort to condemnation. Id. at 744.[21] Subsequently, the Attorney General determined specifically that acquisitions under the Reclamation Act were subject to 40 U.S.C. § 255. See B-80025, October 1, 1948.

Prior to the 1970 revision, 40 U.S.C. § 255 included a provision authorizing the Attorney General to waive the approval requirement with regard to easements and rights-of-way upon determining that waiver would not jeopardize the interests of the United States. See,

[18] 39 Op. Att'y Gen. 99 (1937); 15 Comp. Gen. 539 (1935).

[19] 36 Comp. Gen. 616 (1957); 5 Comp. Dec. 682, 684 (1899).

[20] 1 Comp. Gen. 752 (1922); 1 Comp. Gen. 625 (1922).

[21] A further reason to reject the old theory, which did not exist at the time of these decisions, is the strong federal policy in favor of purchase embodied in 42 U.S.C. § 4651. The decision whether to purchase or condemn is no longer supposed to be purely discretionary.

e.g., 21 Comp. Gen. 125 (1941). The 1970 revision dropped the waiver provision. However, the statute still provides flexibility in that it requires not that title be perfect in all instances, but that it be sufficient for the purpose for which the property is being acquired.[22]

The process of obtaining title approval naturally takes time, and until it is done, the statute prohibits payment of the purchase price. This does not necessarily mean that payment must await the Attorney General's final approval. For example, in 40 Comp. Gen. 153 (1960), GAO agreed that payment could be made for purchases under the Migratory Bird Conservation Act based on a "preliminary title opinion" in which the Attorney General stated that valid title would vest in the United States when specified requirements and objections had been met and a deed to the United States recorded, provided that the requirements and objections involved only routine questions of fact and not questions of law. Of course, should a question arise as to whether a particular condition had been properly satisfied, payment should await the Attorney General's final approval. Somewhat similarly, GAO agreed in an earlier case that payment could be made for purchases under the Reclamation Act prior to receipt of the Attorney General's formal opinion where the only objections disclosed by the title examination were those that would be satisfied out of the purchase price. B-80025, October 1, 1948. It should go without saying that in both of these cases the Justice Department had also agreed that the proposals could be considered as being in compliance with 40 U.S.C. § 255.

Congress in a few instances has provided exceptions from 40 U.S.C. § 255. See, for example, 42 U.S.C. § 1502(b) relating to defense housing. Where 40 U.S.C. § 255 does not apply, the acquiring agency should nevertheless determine, in the exercise of sound discretion, that the title being acquired is adequate to protect the interests of the government. Cf. 21 Comp. Gen. 125 (1941) (agency discretion under former waiver provision). To take the obvious illustration,

[22]There are two other obsolete provisions which should be disregarded when reading the older cases. First, a provision requiring consent of the state legislature was deleted in 1940. The successor to this provision is noted later in our discussion of federal enclaves. Second, a provision, formerly found at 40 U.S.C. § 256, requiring that legal services in connection with procuring title to public building sites be rendered by United States Attorneys, was repealed as part of the 1970 legislation.

payment would never be justified to “persons having no color of right, interest, or title in the land to convey.” Id. at 131.

Congress may also authorize the acquiring agency to commence its use of the land prior to receipt of the Attorney General’s approval. Such a provision is not an exemption from the basic requirement of the statute but merely a deviation from the otherwise applicable time sequence. 6 Op. Off. Legal Counsel 431 (1982).

b. Title Evidence

The traditional form of evidence upon which title opinions are based is the “abstract of title.” This is a rather cumbersome document which summarizes each transaction and occurrence over a given time period which may affect title to the property. At one time, real estate lawyers spent much of their lives squirreled away in the local registry of deeds, charged with the boring task of making title searches. In the early decades of the 20th century, free enterprise came to the rescue of those poor, lost lawyers in the form of title companies. Title companies employ professional abstracters to prepare the abstract, on the basis of which the company issues a “certificate of title” certifying that title is free and clear except as shown on the certificate. Another development has been the growth of title insurance. This is exactly what it sounds like—a policy issued by an insurance company insuring against title defects.

In 1930, Congress amended 40 U.S.C. § 255 to authorize the Attorney General to accept certificates of title as satisfactory title evidence. The statute was amended again in 1940 to permit acceptance of any other evidence which the Attorney General deems satisfactory. When 40 U.S.C. § 255 was revised in 1970, the Justice Department reported that more than 93 percent of titles it approved were based on title certificates or title insurance. S. Rep. No. 91- 1111, at 5 (1970), reprinted in 1970 U.S.C.A.N. 3805, 3809. Thus, although the abstract of title is still the document from which other forms of title evidence spring, the typical government attorney these days seldom sees one.[23] The point to note is that older cases, to the extent they

[23]The Justice Department has published a booklet entitled “Standards for the Preparation of Title Evidence in Land Acquisitions by the United States” (1970), intended to apply both to the Justice Department and to agencies which have been delegated title approval responsibility. A 1992 supplement presents and discusses the title insurance policy adopted in 1991 by the Justice Department and the American Land Title Association.

mention only title abstracts, should now be read to include other forms of title evidence that the Attorney General deems acceptable.

Appropriations are available for other forms of title evidence to the same extent as for title abstracts. A-39589, December 30, 1931;[24] A-39589, January 29, 1932. See also 14 Comp. Gen. 318 (1934).

c. Title Evidence Expenses

(1) Purchase

The fourth paragraph of 40 U.S.C. § 255 provides:

> "Except where otherwise authorized by law or provided by contract, the expenses of procuring certificates of title or other evidences of title as the Attorney General may require may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department or agency."

Actually, this provision reflects what the decisions have held for 150 years: expenses of procuring title evidence incident to the purchase of real property are chargeable to the appropriation from which the purchase price is to be paid.

When the predecessor of 40 U.S.C. § 255 was originally enacted in 1841, it contained no mention of the use of land acquisition funds. It contained only the reference to "contingency appropriations," a type of appropriation common at the time. Nevertheless, the Comptroller of the Treasury held that the cost of procuring title evidence incident to purchase was chargeable to land acquisition appropriations, and commented that this had been "the established practice for many years—probably over fifty." 3 Comp. Dec. 216, 217 (1896).

The Comptroller went on to explain the statutory reference to contingency appropriations. The 1841 enactment, the first general requirement of its type, directed the Attorney General to examine the titles not only to land to be purchased in the future, but also to land which had already been purchased. With respect to previously purchased land, the purchase appropriations for the most part would have already lapsed. Thus, the reference to contingency

[24]As noted earlier under the Title Approval heading, this decision has been repudiated to the extent it found 40 U.S.C. § 255 not applicable. However, it remains valid for the point cited in the text.

appropriations was intended to provide a source of funds for title expenses relating to previously purchased land for which no other appropriations were currently available. 3 Comp. Dec. at 217.

The reference in 40 U.S.C. § 255 to land acquisition appropriations was added in 1940 (54 Stat. 1083, 1084). By then, the rule of 3 Comp. Dec. 216 had become established beyond dispute.[25] Thus, the 1940 amendment formalized the existing case law, and the reference to contingency appropriations should be viewed as obsolete. There has been little need to discuss the rule since 1940 because, in addition to the decisions, it now has a clear statutory basis. See 21 Comp. Gen. 744 (1942); B-142862, June 21, 1960. The rule applies equally in situations where 40 U.S.C. § 255 does not apply. 25 Comp. Dec. 195 (1918).

Land acquisition appropriations are available exclusively. General operating appropriations may not be used. A-33604, October 11, 1930; A-33604, November 14, 1930 (reconsideration).

Several of the early decisions mention a statute enacted in 1889 which required the seller to furnish title evidence, without expense to the government, if the land was to be used as the site for a public building. E.g., 8 Comp. Dec. 212 (1901). It was carried for many years as part of 40 U.S.C. § 256. It was repealed in 1961 (75 Stat. 577).

(2) Donation

Persons who donate land to the United States are often unwilling to bear the expense of furnishing proof of their title. If the receiving agency has an appropriation available for the purchase of land for the same purpose as that for which the donation is being made, the cost of title evidence is chargeable to that appropriation. A-97769, September 20, 1938; A-47693, March 31, 1933; A-26824, April 25, 1929. If the agency has no such appropriation available, the cost of title evidence may be charged to the current Salaries and Expenses appropriation. A-47693, cited above.

[25] Some of the cases are 8 Comp. Gen. 308 (1928); 3 Comp. Gen. 569 (1924); 9 Comp. Dec. 569 (1903); A-97769, September 20, 1938; A-47693, March 31, 1933; A-39589, December 30, 1931; A-26824, April 25, 1929.

We noted previously in our discussion of 41 U.S.C. § 14 that an agency with authority to accept donations of both land and money may use donated funds to purchase land if the funds were donated for the general purpose for which the land is desired. 2 Comp. Gen. 198 (1922). As a logical extension of this principle, the funds are also available for the procurement of necessary title evidence with respect to donated land. A-26824, April 25, 1929.

(3) Condemnation

An early line of GAO decisions addressed the use of Justice Department appropriations to pay the costs of condemnation proceedings. Although the decisions have never been overruled or modified, legislative developments have rendered them largely obsolete. Those early GAO decisions held that the cost of obtaining title evidence for use in condemnation proceedings is chargeable to appropriations of the Department of Justice. E.g., 8 Comp. Gen. 308 (1928).[26] In fact, almost every decision discussing title evidence incident to purchase points out that the rule for purchase does not apply in condemnation situations. When those decisions were rendered, the holding was viewed simply as an application of the general proposition that the Justice Department receives appropriations to conduct its litigation, and expenses necessarily incurred incident to that litigation are chargeable to those appropriations.

There were exceptions even under the early decisions. Thus, land acquisition appropriations of the acquiring agency were held available for procuring title evidence incident to condemnation proceedings where the governing legislation authorized the handling of condemnation proceedings jointly by the Justice Department and the acquiring agency (21 Comp. Gen. 744 (1942)); where 40 U.S.C. § 255 was not applicable (25 Comp. Dec. 195 (1918)); where the title evidence was to be used “primarily or in the first instance” to attempt to negotiate a settlement without proceeding to judgment (22 Comp. Gen. 20 (1942)); and where the land acquisition appropriation was expressly available for “expenses incidental” to

[26] See also 9 Comp. Dec. 569 (1903); 3 Comp. Dec. 216 (1896); B-142862, June 21, 1960; B-98346, October 9, 1950; A-47693, March 31, 1933; A-39589, December 30, 1931.

the acquisition (see B-55181, February 15, 1946). Justice Department appropriations were also held unavailable where the title evidence was needed for matters subsequent to the final judgment of condemnation. 23 Comp. Dec. 53 (1916).

The provision that is now the fourth paragraph of 40 U.S.C. § 255, quoted above in connection with purchase, was traditionally viewed as applicable to purchase and not to condemnation, both before and after the 1940 amendment which added the reference to land acquisition funds, notwithstanding that its language is broad enough to encompass condemnation. 23 Comp. Dec. 53, 56 (1916); 21 Comp. Gen. 744, 748 (1942). Thus, while there was an apparent willingness to find exceptions at the drop of a hat, the "general rule" remained that title evidence for use in condemnation proceedings was an expense of litigation chargeable to Justice Department funds.

Our research has disclosed no mention of this issue after 1960. However, a subsequent legislative development appears to have changed things. Earlier in this chapter, we reviewed federal land acquisition policy under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Under 42 U.S.C. § 4651(1), it is now the established federal policy that agencies are to make every reasonable effort to acquire real property by negotiation and purchase before resorting to condemnation.

When an agency is budgeting for its land acquisition needs, it must generally do so on the assumption that purchase negotiations will succeed. In other words, it must be prepared to meet the expenses it will have to bear incident to purchase. One of these, as we have seen, is the cost of obtaining title evidence. In the typical situation where an agency resorts to condemnation because purchase negotiations did not succeed, unless Congress has expressly deleted the relevant portion of the agency's budget request, it may be said that Congress has provided for title evidence expenses to be borne by the agency's land acquisition funds. In this situation, shifting the expense to the Justice Department could be viewed as augmenting the acquiring agency's appropriation.

With no decisions for guidance, it is impossible to define with any degree of certainty those situations in which the expenses might still be a proper charge to Justice Department appropriations. Nevertheless, the policy of the Uniform Relocation Act has largely eliminated any basis for distinguishing between purchase and condemnation on this particular issue, and it seems safe to conclude that, at least with respect to acquisitions subject to the policy guidance of 42 U.S.C. § 4651, what was once the rule is now the exception.

5. Methods of Acquisition

a. Purchase

As we have seen, voluntary negotiation and purchase is the preferred method of federal land acquisition.[27] To do this, an agency needs statutory authority (41 U.S.C. § 14), an available appropriation, and title approval (40 U.S.C. § 255). The transaction itself follows the same steps as one between private parties—a Purchase-and-Sale Agreement followed by a closing at which the deed is delivered.

The Purchase-and-Sale Agreement, although certainly a contract, is not governed by the Contract Disputes Act because the Contract Disputes Act does not apply to "the procurement of . . . real property in being." 41 U.S.C. § 602(a)(1). This exemption does not extend to newly created lease agreements, which remain subject to the Contract Disputes Act. Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985).

Nothing prohibits the government from purchasing property encumbered by liens. 12 Comp. Dec. 691, 697 (1906). However, at or before closing, the liens must either be fully satisfied or "adequate provision should be made therefor." Department of Justice, Regulations of the Attorney General Promulgated in Accordance With the Provisions of Public Law 91-393, § 6(a)(1970). One way to "adequately provide" is to withhold an appropriate amount from the purchase price. 10 Op. Att'y Gen. 353 (1862).

A question applicable to government acquisitions as well as private transactions is who bears the risk of loss if the property is damaged

[27]For step-by-step procedural guidance and an appendix of forms, see Land [now Environment] and Natural Resources Division, U.S. Department of Justice, A Procedural Guide for the Acquisition of Real Property by Government Agencies (1972).

or destroyed between the time the Purchase-and-Sale Agreement is signed and the deed delivered, where the loss or damage is not the fault of either party. This can result from such things as fire, soil erosion, or various forms of natural disaster. It is impossible to give a simple answer because the government's rights are determined by the law of the state in which the property is located. E.g., Foster v. United States, 607 F.2d 943, 948 (Ct. Cl. 1979); United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 822 (S.D. Cal. 1958).

Several states have adopted the Uniform Vendor and Purchaser Risk Act, under which the party in possession bears the risk of loss. E.g., Long v. Keller, 163 Cal. Rptr. 532 (Cal. Ct. App. 1980). In states which still apply the common law, the majority rule places the risk of loss on the purchaser on the theory that "equitable title" passes when the contract of sale is executed. E.g., Zitzelberger v. Salvatore, 458 A.2d 1021 (Pa. Super. Ct. 1983). Other states place the risk on the seller. E.g., Laurin v. DeCarolis Construction Co., 363 N.E.2d 675 (Mass. 1977). In one GAO decision, the government had entered into a contract to acquire an easement, in a state which followed the majority rule, when erosion caused some of the land to cave into a river. Since the risk of loss had passed to the government, the government was liable under the contract. B-148823, July 24, 1962. In any jurisdiction, the parties can control the issue by specifically addressing it in the contract of sale.

Once the deed is recorded and legal title passes to the United States, the government owns the property and must bear any risk of loss even though it may not yet have taken possession or paid the purchase price. 23 Comp. Gen. 323 (1943).

The same risk-of-loss rules apply where the government is the seller. 37 Comp. Gen. 700 (1958); 36 Comp. Gen. 90 (1956); B-137673, October 31, 1958.

The consideration specified in the deed is prima facie evidence of the agreed-upon purchase price. However, this can be overcome by "clear and convincing" evidence to the contrary, in which event it may be possible to consider a claim for an additional amount. 7 Comp. Gen. 107 (1927). See also 4 Comp. Gen. 21 (1924).

b. Involuntary Acquisition

(1) Overview

We saw earlier in this chapter that the power of eminent domain is inherent in the United States. It has been termed “essential to a sovereign government.” United States v. Carmack, 329 U.S. 230, 236 (1946). The reason should be obvious. If the power did not exist, private citizens could block urgent and necessary federal projects by simply refusing to sell. Kohl v. United States, 91 U.S. 367, 371 (1875).

The power of eminent domain is vested in the legislative branch. Congress may exercise it directly, or may delegate it to the executive branch to be exercised in any manner that does not violate the Constitution. E.g., 2,953.15 Acres v. United States, 350 F.2d 356 (5th Cir. 1965).

An executive agency exercises the delegated power of eminent domain by what is called “condemnation.” There are two types of condemnation, direct and inverse. A direct condemnation is a judicial action brought by the condemning authority, such as the United States, in the exercise of its power of eminent domain. United States v. Clarke, 445 U.S. 253, 255 (1980). There are two major forms of direct condemnation, declaration of taking and “complaint only.” Inverse condemnation refers to a wide variety of claims for “just compensation” under the Fifth Amendment. About the only thing that inverse condemnation claims necessarily have in common is that they reflect a determination that some action by the government has sufficiently infringed upon a private property right so as to create a right to “just compensation.” It differs from direct condemnation in that the government did not intend to take the property. The concepts and case law for both types are discussed below in greater detail. Whichever form is used, condemnation always involves a court proceeding. There is no such thing as administrative condemnation.

Condemnation actions are brought in the United States district court for the district where the land is located. 28 U.S.C. §§ 1358, 1403. Procedures are contained in Rule 71A, Federal Rules of Civil Procedure. The United States is the plaintiff.

Whichever form of condemnation is used, cost limitations in the authorizing legislation or appropriation do not affect either the authority to condemn or the judicial determination of just compensation. Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 586 (1923); Shoemaker v. United States, 147 U.S. 282, 302 (1893); United States v. Certain Real Estate Lying on the South Side of Broad Street, 217 F.2d 920, 925 (6th Cir. 1954). (The 6th Circuit case involved a declaration of taking; Hanson Lumber and Shoemaker predated the Declaration of Taking Act.)

If land taken by eminent domain is no longer needed, the former owner stands in the same position as any other member of the public. There is no automatic right of repurchase. B-165511, March 21, 1978. Of course, Congress can always provide such a right in a particular context. Also, the deed conveying the property to the government may specify a right of repurchase. Id.

(2) Sources of authority

A question that was once open to some debate was whether statutory authority to acquire land by purchase was sufficient to trigger the government's inherent eminent domain power, or whether it had to specify condemnation as well as purchase. See, e.g., Kohl v. United States, 91 U.S. 367, 374 (1875). To remove any doubt, Congress enacted a statute in 1888, sometimes called the General Condemnation Act of 1888 and now found at 40 U.S.C. § 257, which authorizes any federal agency with authority to purchase land to use condemnation also. It provides:

> "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so . . . ."

Note that 40 U.S.C. § 257 is not an independent grant of land acquisition authority. That must exist elsewhere. If you have statutory authority to purchase land, 40 U.S.C. § 257 supplements it and permits you to use condemnation. Carmack, 329 U.S. at 235; Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); 19 Comp. Gen. 739, 744 (1940). The constitutionality of 40 U.S.C. § 257 has long been settled. Chappell v. United States, 160 U.S. 499 (1896).

The significance of 40 U.S.C. § 257 is that it makes no difference whether the legislation authorizing a particular acquisition says "purchase or condemnation" or merely "purchase" or "acquire." If the authorizing legislation does not specify condemnation, the authority exists anyway by virtue of 40 U.S.C. § 257. Of course, Congress is always free to limit an acquisition statute to voluntary purchase, in which event 40 U.S.C. § 257 would be subordinated. United States v. 16.92 Acres, 670 F.2d 1369, 1371-72 (7th Cir. 1982).

Some agencies have their own condemnation authority. Examples are 10 U.S.C. § 2663 (military departments), 33 U.S.C. §§ 591-594 (Army Corps of Engineers, river and harbor improvements), and 43 U.S.C. § 421 (Reclamation Act of 1902). Although there is little case law, these statutes stand side-by-side with 40 U.S.C. § 257. Hence, an agency with overlapping statutes can elect which one to proceed under in a given case. See Hanson Lumber Co. v. United States, 261 U.S. 581 (1923); Chappell v. United States, 81 F. 764 (4th Cir. 1897); United States v. 80 Acres, 26 F. Supp. 315, 321 (E.D. Ill. 1939); In re Military Training Camp in Prince George County, Va., 260 F. 986 (E.D. Va. 1919); B-98346, October 9, 1950. (Hanson and B-98346 involve the river and harbor legislation; Chappell and Training Camp involve the predecessor of what is now 10 U.S.C. § 2663.)

In sum, every federal agency which is authorized to acquire real property is authorized to resort to condemnation. The authority may be in the form of an agency-specific or program-specific grant of condemnation authority, or it may be in the form of purchase authority, with the condemnation authority derived from 40 U.S.C. § 257.

(3) Legislative taking

When Congress exercises the power of eminent domain directly, it is called a "legislative taking." Congress can accomplish legislative taking simply by enacting a statute which declares that title to the property will vest in the United States as of a specified date, usually the date of enactment. Kirby Forest Industries v. United States, 467 U.S. 1, 5 (1984). An example is the legislation establishing the Redwood National Park, 16 U.S.C. §§ 79c, 79c-1. Another example is the 1988 legislation which expanded the Manassas National Battlefield Park, 16 U.S.C. § 429b(b).

In a legislative taking, since the actual taking is accomplished by statute, the only thing for the court to do is determine the amount of compensation. Court action remains necessary even in a legislative taking because, in any Fifth Amendment taking situation, the determination of just compensation is a judicial function. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893); 59 Comp. Gen. 380 (1980).

The legislative taking device is infrequently used. With respect to national parks, the Senate Committee on Interior and Insular Affairs has stated a policy that "legislative taking is an extraordinary measure which should be invoked only in those instances in which the qualities which render an area suitable for national park status are imminently threatened with destruction." S. Rep. No. 93-875, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 5554, 5558, and quoted in B-125035-O.M., April 21, 1976.

This "classic" use of the term "legislative taking" involves the actual acquisition of title by the United States. Courts have begun to use the term in a somewhat broader sense, to describe situations in which a statute, by its very enactment, deprives a private party of some lesser interest. An example is Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 502 U.S. 952, holding that the enactment of the Surface Mining Control and Reclamation Act of 1977, by prohibiting certain surface mining, effectively "took" the plaintiff's coal mining rights.

(4) Declaration of Taking Act

The Declaration of Taking Act, enacted in 1931 and found at 40 U.S.C. §§ 258a-258e,[28] provides a procedure whereby the United States can get immediate title to property it needs to condemn. Under the Act, the United States may file, either with the original petition or at any time before judgment, a "declaration of taking." The contents of the declaration are set out in 40 U.S.C. § 258a. Along with the declaration, the acquiring agency must deposit its estimated just compensation with the court. Under this statute, once

[28]The legislation was proposed by the Attorney General in a December 1930 letter, quoted in full in United States v. Parcel of Land, 100 F. Supp. 498, 502 n.5 (D.D.C. 1951).

the declaration is filed and the deposit made, two things happen: (1) title to the land, or lesser interest if specified in the declaration, vests in the United States, that is, the land is "taken"; and (2) the right to just compensation vests in the former owner and the United States becomes irrevocably committed to payment of the ultimate award.

The court may order the money on deposit paid over immediately or during the course of the proceedings, on application of the parties in interest. If the ultimate award exceeds the amount of the deposit, the court enters a deficiency judgment against the United States. Id. If the ultimate award is less than the amount paid over from the deposit, the United States is entitled to recover the overpayment, and a judgment to this effect may be entered in the same proceeding. United States v. Miller, 317 U.S. 369, 380-82 (1943); Rule 71A(j), Federal Rules of Civil Procedure.

Once the declaration has been filed and the court deposit made, the agency may proceed to demolish existing structures or erect new ones, provided that the Attorney General is of the opinion that title has vested in the United States or that all interested parties will be bound by the final judgment. 40 U.S.C. § 258e. Also, once title passes to the government, any rentals accruing from the property are payable to the United States, not to the former owner. 15 Comp. Gen. 740 (1936).

The purposes of the Declaration of Taking Act are (1) to permit the government to take immediate possession while simultaneously reducing costs by avoiding liability for interest on the amount of the deposit, and (2) to give the former owner with clear title immediate cash compensation to the extent of the government's estimate. Miller, 317 U.S. at 381.

The Declaration of Taking Act is not an independent grant of acquisition authority or condemnation authority. It merely provides procedures which may be used where the acquiring agency already has the requisite authority to acquire the land in the first place. United States v. Dow, 357 U.S. 17, 23 (1958); Catlin v. United States, 324 U.S. 229, 240 (1945). The constitutionality of the statute has been upheld in several cases. E.g., Travis v. United States, 287 F.2d 916 (Ct. Cl. 1961), cert. denied, 368 U.S. 824.

Apart from issues of just compensation, judicial review is limited to determining that the taking is for a statutorily authorized purpose and that it is for a public use. Catlin, 324 U.S. at 240-43; United States v. Acquisition of 0.3114 Cuerdas, 753 F. Supp. 50, 53 (D. P.R. 1990). In performing this review, the courts will not "second-guess governmental agencies on issues of necessity and expediency" but will essentially look only at "the bare issue of whether the limits of authority were exceeded." United States v. 162.20 Acres, 639 F.2d 299, 303 (5th Cir. 1981), cert. denied, 454 U.S. 828.

As a general proposition, when several tracts are being acquired in a single proceeding, the deposit with the court should be allocated by tract. United States v. 355.70 Acres, 327 F.2d 630 (3d Cir. 1964). The ultimate award may exceed the allocation for some parcels but be below it for others. As long as the money came from the same appropriation, the excess amounts may be used to pay the deficiencies. 19 Comp. Gen. 634 (1940). See also A-88947, December 7, 1937.

As the preceding paragraph suggests, the treatment of money deposited with the court but not needed for whatever reason for its original purpose is governed by the usual rules applicable to the obligation and availability of appropriated funds. Thus, for example, unused funds could not be re-obligated after expiration of the original period of availability to acquire a tract not encompassed by the original obligation. A-88947, October 2, 1937.

An area which appears not to have been explored to any great extent is the relationship of the Declaration of Taking Act to the Antideficiency Act, 31 U.S.C. § 1341, which prohibits making obligations or expenditures in excess or advance of appropriations. An important provision in this connection is 40 U.S.C. § 258c:

"Action under section 258a of this title irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid."

Just months after the Declaration of Taking Act was enacted, an agency needed to acquire a piece of property and was authorized to do so by purchase or condemnation, subject to a monetary cost ceiling. The agency had obtained three appraisals, all of which were within the cost ceiling. The property owner had demanded a price higher than the appraisals and in excess of the statutory ceiling. The agency thought the owner's asking price was excessive, and that a condemnation award would be more in line with the appraisals and within the appropriation limit. The agency asked whether the Antideficiency Act would preclude it from filing a declaration of taking, since there was no guarantee that the ultimate court award would not exceed the appropriation limit. Since the Declaration of Taking Act does not require absolute certainty (indeed it could not since the judicial determination is beyond the control of the acquiring agency), but merely requires that the agency be of the "opinion" that the award will "probably" be within applicable limits, the Comptroller General advised that the agency could proceed with the condemnation. A-37316, July 11, 1931. Thus, the mere fact that a final award exceeds an applicable limit does not produce an Antideficiency Act violation, and to this extent the Declaration of Taking Act may be said to authorize the over-obligation.[29]

This, however, should not be taken to mean that an agency can act indiscriminately. GAO and the Justice Department have both held that 40 U.S.C. § 258c prohibits the initiation of Declaration of Taking Act proceedings when the agency knows or believes that the award will exceed an applicable ceiling.[30] 57 Comp. Gen. 591 (1978); 2 Op. Off. Legal Counsel 96 (1978). While the specific limitation involved in these two cases no longer exists, the basic point remains valid. Accordingly, while we have found no cases precisely on point, it does not seem unreasonable to suggest that compliance with 40 U.S.C. § 258c, as was clearly the case in the 1931 decision discussed above, is an important factor in evaluating compliance with the Antideficiency Act. In other words, compliance with section 258c should insulate an agency against Antideficiency Act

[29]There are statements in two later decisions, one flatly stating and the other strongly implying, that the Antideficiency Act is violated by an over-obligation resulting from a Declaration of Taking Act proceeding. 54 Comp. Gen. 799, 801 (1975); 17 Comp. Gen. 664, 669 (1938). However, neither decision analyzes what the agency did as opposed to what the court did, and these statements would therefore seem of limited value as guidance.

[30]A monetary ceiling in a statute which specifies only purchase will apply to condemnation as well unless the statute provides otherwise. 10 Comp. Gen. 418 (1931); 6 Comp. Gen. 145 (1926).

violations, whereas an agency which violates section 258c should not be so insulated.

This in turn leads to the question of what constitutes compliance with 40 U.S.C. § 258c, and this too is not always clear. Courts have generally been unwilling to impose a good faith test on the amount of the agency's deposit. United States v. Cobb, 328 F.2d 115 (9th Cir. 1964); In re United States of America, 257 F.2d 844 (5th Cir. 1958), cert. denied, sub nom. Certain Interests in Property v. United States, 358 U.S. 908. One court has gone so far as to suggest that 40 U.S.C. § 258c is satisfied by virtue of the acquiring agency's request to the Attorney General to initiate condemnation proceedings. United States v. 40.75 Acres, 76 F. Supp. 239, 245-246 (N.D. Ill. 1948). However, the courts are not unanimous. The Second Circuit has assumed, for the sake of argument, that it can act when the government's estimate is made in bad faith. United States v. 44.00 Acres, 234 F.2d 410, 415 (2d Cir. 1956), cert. denied, sub nom. Odenbach v. United States, 352 U.S. 916. The Fourth Circuit was "puzzled" by the actions of an agency in depositing one dollar as its estimate of just compensation after offering $180,000 to purchase the land, but resolved the case without having to address the good faith issue. United States v. 45.33 Acres, 266 F.2d 741 (4th Cir. 1959).

Whether the enactment of the Uniform Relocation Act in 1970, which seems to require good faith (see Federal Land Acquisition Policy heading earlier in this chapter), would make any difference is perhaps debatable. In any event, the issue in all of these cases was whether a court could attack the validity of a declaration of taking, which is very different from an Antideficiency Act question. An Antideficiency Act violation could not invalidate a declaration of taking because, if for no other reason, a statute cannot impede the constitutional right to just compensation.

Condemnation "extinguishes all interests in a piece of property and vests absolute title in the government." Schoellkopf v. United States, 11 Cl. Ct. 447, 450 (1987) (emphasis omitted). The United States acquires title "free from all liens or claims whatsoever." United States v. 150.29 Acres, 135 F.2d 878, 880 (7th Cir. 1943). Previous interests "are obliterated." United States v. 25.936 Acres, 153 F.2d 277, 279 (3d Cir. 1946). This applies alike to outstanding mortgages (Schoellkopf), tax liens (150.29 Acres, 25.936 Acres), and judgment liens (10 Comp. Dec. 852 (1904)). While some jurisdictions may give the creditor a right of action against the former property owner (see Schoellkopf, 11 Cl. Ct. at 450), the general rule is that the funds deposited with the court take the place of the property itself and any liens attach to the funds and not to the property. E.g., 150.29 Acres, 135 F.2d at 880; United States v. 17,380 Square Feet, 678 F. Supp. 443, 445 (S.D. N.Y. 1988); United States v. Certain Property, 225 F. Supp. 498, 504 (S.D. N.Y. 1963). Even where there is no declaration of taking, the recommended procedure if outstanding liens are known is to either make payment to the registry of the court or require the owner to satisfy the liens. 11 Comp. Gen. 498 (1932).

In view of the necessity for a judicial determination, there should be little, if any, occasion to consider administrative claims in connection with a Declaration of Taking Act condemnation. An exception occurred in B-79080, October 12, 1948, allowing a claim for the value of structures which had been removed prior to, and were not included in, the judicial award of just compensation. As a general proposition, however, there is no basis to administratively consider a claim which could have been raised before the court but was not. E.g., B-107841, April 18, 1952.[31]

(5) "Complaint only" condemnation

The second way a federal agency can condemn property directly is by filing a complaint without a declaration of taking. This is sometimes called a "complaint only" or "straight" condemnation. A "complaint only" condemnation is different from a Declaration of Taking Act proceeding in several essential respects: there is no deposit with the court, no immediate vesting of title, and no irrevocable commitment on the part of the United States to pay the award.

In a "complaint only" condemnation, the main purpose of the proceeding is to determine the amount the government will have to pay if it chooses to acquire the property. The government may abandon the proceeding, and is under no obligation to take the land or pay the award. The award amounts to an offer which the

[31]In that case, the government returned part of the condemned property to the former owner who then filed a claim for damages which allegedly occurred during government occupancy.

government may accept by tendering payment. Of course, title does not pass unless and until the compensation is paid. The proceeding also gives the landowner the opportunity to contest the taking. Once the award is made, the decision of whether or not to consummate the condemnation is solely in the government's hands.[32]

If the government abandons the proceeding or chooses not to consummate the condemnation, it must nevertheless compensate the landowner for any public use made of the property. E.g., United States v. 14,770.65 Acres, 616 F. Supp. 1235, 1251 (D. S.C. 1985).

It has been held that, in a "complaint only" proceeding under the General Condemnation Act (40 U.S.C. § 257), no officer of the United States has authority to consent to the entry of a money judgment against the United States, and a judgment purporting to obligate the government is "void and unenforceable." Moody v. Wickard, 136 F.2d 801, 803 (D.C. Cir. 1943). This follows from principles of sovereign immunity and the requirements of the appropriations clause. Thus, under section 254, "an award in condemnation is [merely] an offer subject to acceptance by the [United States]." Id.

It should be apparent that whether to use a declaration of taking or a "complaint only" procedure depends on two main factors: the urgency of the government's need for possession and the availability of funds. In view of the nature of the proceeding, the insufficiency of funds is not a bar to initiating a "complaint only" condemnation. A-5473, November 22, 1924. However, the status of funding is not wholly irrelevant. The United States does not have an indefinite amount of time to respond to the award. In order not to erode the concept of just compensation, the United States must act within a reasonable time or risk dismissal of the proceeding. Miller v. United States, 57 F.2d 424 (D.C. Cir. 1932). In the case cited, the proceeding was dismissed where there was no available appropriation at the

[32]The summary in the text has been distilled from a number of cases: Kirby Forest Industries v. United States, 467 U.S. 1 (1984); Danforth v. United States, 308 U.S. 271 (1939); Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939); United States v. 6,667 Acres, 142 F. Supp. 198 (E.D. S.C. 1956); United States v. One Parcel of Land, 131 F. Supp. 443 (D.D.C. 1955); United States v. Certain Parcel of Land, 51 F. Supp. 726 (E.D. N.Y. 1943); United States v. Certain Lands, 46 F. Supp. 386 (S.D. N.Y. 1942).

time of the award and, a year later, no appropriation had been made nor was a bill pending.

(6) Inverse condemnation

The term "inverse condemnation" (sometimes called "reverse condemnation") encompasses a variety of situations with only one thing in common: they involve acts which the courts view as takings of some interest in private property for which just compensation is payable under the Fifth Amendment. The Supreme Court has called it "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." United States v. Clarke, 445 U.S. 253, 257 (1980).

The Court of Federal Claims has used the following definition:

> "Inverse condemnation, therefore, 'is a legal label for effective expropriation of private property, the sovereign acting indirectly without benefit of formal eminent domain proceedings in condemnation; thus, sovereign acts incompatible with an owner's present enjoyment of his property rights'." Schultz v. United States, 5 Cl. Ct. 412, 415 (1984), quoting Wilfong v. United States, 480 F.2d 1326, 1327 n.2 (Ct. Cl. 1973).

The concept is thus an umbrella which covers a wide variety of situations ranging from the actual physical seizure of property to various lesser forms of "invasion."

Inverse condemnation claims are based on the Fifth Amendment. Thus, the jurisdiction of the courts derives from the Tucker Act, under which claims not exceeding $10,000 may be brought either in the district courts or in the Court of Federal Claims, while claims in excess of $10,000 must be brought in the Court of Federal Claims. 28 U.S.C. §§ 1346(a)(2), 1491.

At one time, it was commonplace to say that the United States may exercise its power of eminent domain in either of two ways—by instituting formal condemnation proceedings, or by simply taking physical possession with the owner having a remedy under the Tucker Act. E.g., United States v. Dow, 357 U.S. 17, 21 (1958). As the Supreme Court noted in Kirby Forest Industries v. United States, 467 U.S. 1, 5 (1984), this is still true in the sense that land acquisition by inverse condemnation remains within the power of the United

States, and the parties end up in the same place either way. However, it has been federal policy since enactment of the Uniform Relocation Act that formal condemnation proceedings should be instituted if a voluntary purchase cannot be negotiated, and that an agency should never intentionally force a property owner to bring an inverse condemnation suit.[33] 42 U.S.C. § 4651(8). If agencies pay due regard to this established policy, inverse condemnation cases involving the intentional acquisition of title should largely disappear, and situations like the one described in Althaus v. United States, 7 Cl. Ct. 688 (1985), should no longer happen.[34]

In view of this, while one still encounters the statement that private property can be taken by inverse condemnation, it is more likely to be found in the context of some form of regulatory taking. E.g., Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 800 (Fed. Cir. 1993). In this connection, Executive Order No. 12,630, March 15, 1988, instructs executive agencies to carefully evaluate their activities to prevent unnecessary takings.

6. Obligation of Appropriations for Land Acquisition

a. Voluntary Purchase

As we have noted, the typical transaction follows the same path as one between private parties. The government enters into a purchase contract with the seller, which is later followed by the execution of a

[33]An agency might be tempted to do this, for example, if it thought it could get a "free ride" by having the judgment paid from the permanent judgment appropriation, 31 U.S.C. § 1304. This is the policy basis for GAO's position, discussed in Chapter 14, that certain inverse condemnation judgments should be paid from agency land acquisition funds, the same as direct condemnations. Within the realm of direct condemnations, the Uniform Relocation Act does not purport to regulate whether to use a declaration of taking or "complaint only." Kirby, 467 U.S. at 6.

[34]In Althaus, a government representative allegedly threatened landowners to get them to sell cheaply. There was no recording of what was actually said, but the court summarized its findings at 7 Cl. Ct. 691-692. In effect, the agent told the landowners: "We are going to offer you 30 cents on the dollar and if you don't take it, we'll condemn the land anyway and you'll have to hire an expensive lawyer from the big city who'll take a third of what you get, plus you'll have to pay the court costs." Somehow, he forgot to add ". . . and your little dog, too!"

deed. When a formal purchase contract is used, the obligation occurs when the contract is executed. 17 Comp. Gen. 664, 668 (1938); A-76119, July 3, 1936; A-59458, January 15, 1935. Decision A-59458 stated the principle as follows:

"Ordinarily, a contract for the purchase of real property to supply an existing need executed in good faith prior to the expiration date of an appropriation is considered sufficient to obligate the appropriation . . . ."

Since we are dealing with a contract, the obligation is recorded under 31 U.S.C. § 1501(a)(1).

If there is no formal purchase contract, the obligation occurs when the deed is executed. 17 Comp. Gen. 664, 668 (1938); 4 Comp. Gen. 371 (1924); A-76119, July 3, 1936.

Where a purchase option is involved, and the government accepts the option in accordance with its terms and within the option period, assuming it has not been sooner revoked, the obligation occurs upon acceptance of the option. The reason is that acceptance of the option in these circumstances constitutes a contract. 56 Comp. Gen. 351, 352 (1977); 17 Comp. Gen. 664, 668 (1938); A-76119, July 3, 1936; A-59458, January 15, 1935.

Once the money is properly obligated, as with any other obligation, it remains available to liquidate the obligation until the account is closed. Thus, in 56 Comp. Gen. 351, GAO advised that there was nothing objectionable in a proposal to spread payment out over four years, as long as the full amount of the purchase price was obligated in the year the purchase agreement was executed.[35]

b. Condemnation

A long line of decisions has established that, in a condemnation case, the obligation occurs when the acquiring agency makes the request to the Attorney General to institute the condemnation proceedings. E.g., 34 Comp. Gen. 418, 423 (1955); 34 Comp. Gen. 67 (1954); 17 Comp. Gen. 664, 668 (1938); 17 Comp. Gen. 631 (1938);

[35]At the time of 56 Comp. Gen. 351, obligated balances remained available, in one form or another, to liquidate the obligation indefinitely. While the result of that case remains the same, an agency should agree to an extended period of time to pay out the balance of the purchase price only after considering the provisions of 31 U.S.C. §§ 1551-1555.

17 Comp. Gen. 111 (1937).[36] The fact that the Attorney General may not actually initiate the proceedings until the following fiscal year is irrelevant. The reason is that an appropriation can be obligated only by the agency to which it was made. E.g., 4 Comp. Gen. 206, 207 (1924).

Where the land acquisition appropriation is available for "expenses incidental" to the acquisition, the obligation for the condemnation award may be viewed as also encompassing necessary expenses incident to the condemnation proceeding, even where the expense is not actually incurred until the following fiscal year. B-55181, February 15, 1946 (title evidence); A-88353, June 18, 1938 (technical studies, etc.).

The exercise of a purchase option followed by condemnation complicates the picture. This can happen, for example, if the seller's title turns out to be defective and must be cleared through condemnation. In this situation, the agency may retain the original obligation, recorded when the purchase option was accepted, or it may de-obligate and record a new obligation when the request for condemnation is made. If the agency retains the original obligation and the condemnation award exceeds the available appropriation, the excess may be charged to appropriations current when the condemnation proceedings were requested. 17 Comp. Gen. 664 (1938). This decision was "amplified" by 19 Comp. Gen. 944 (1940), to emphasize that the administrative choice is not absolute. The agency has the election outlined in 17 Comp. Gen. 664 only where "the condemnation proceedings reasonably may be viewed as a continuation of, and incident to, the land acquisition transaction initiated by the option acceptance." 19 Comp. Gen. at 947. In making this determination, the lapse of time between option acceptance and

[36]A couple of early decisions—1 Comp. Gen. 735 (1922) and 21 Comp. Dec. 870 (1915)—intimated that the obligation arises when the proceeding is actually commenced. Read in the context of later decisions, although not modified expressly by these decisions, these cases should not be construed as selecting actual commencement over the request for obligation purposes.

the condemnation request is relevant but not conclusive. Id. at 947-948.[37] Although there are no decisions, it would seem rather obvious that the principle of these two decisions should apply equally where the original obligation is a formal purchase contract rather than an option acceptance.

The preceding paragraph is best illustrated by a hypothetical example. Suppose an agency has $1,000,000 in fiscal year 2001 money to acquire a piece of property. Before the end of fiscal year 2001, the agency exercises an option or enters into a formal purchase contract for $1,000,000, and records the obligation against its fiscal year 2001 appropriation. In fiscal year 2002, the agency discovers that the seller's title is defective and promptly asks the Attorney General to initiate condemnation. At this point, the agency has a choice. It may retain the original obligation, or it may de-obligate the fiscal year 2001 money and record a new obligation against its fiscal year 2002 land acquisition appropriation (assuming it has one). If the agency retains the 2001 obligation and the condemnation award turns out to be $1,200,000, it may charge the $200,000 "deficiency" to its 2002 funds.

The basic rule for obligating in condemnation cases—that the obligation occurs when the Attorney General is asked to initiate the proceedings—clearly applies when a declaration of taking is used. 34 Comp. Gen. 418, 423 (1955); 34 Comp. Gen. 67 (1954). Indeed, the statutory basis for recording obligations in this context—31 U.S.C. § 1501(a)(6), liability resulting from pending litigation—was intended to address precisely this situation. 35 Comp. Gen. 185, 187 (1955). The rule also clearly applies where an agency is operating under condemnation authority, such as 33 U.S.C. § 594 (Army Corps of Engineers), which authorizes the taking of immediate possession contingent upon the making of adequate provision for the payment of just compensation. See 1 Comp. Gen. 735 (1922).

[37]Unreasonable delay may have other consequences as well. In one case, an agency accepted a purchase option and, after a largely unexplained 2-year delay, filed a condemnation complaint with declaration of taking. The court threw out the option price and permitted the landowner to establish a current (and higher) market value as of the declaration of taking. But for this delay, the option price would have been binding. United States v. 813.96 Acres, 45 F. Supp. 535 (W.D. Ark. 1942), aff'd sub nom. United States v. Stott, 140 F.2d 941 (8th Cir. 1944). See also United States v. 2,974.49 Acres, 308 F.2d 641 (4th Cir. 1962); United States v. 74.12 Acres, 81 F.R.D. 12 (D. Mass. 1978).

In a "complaint only" condemnation, however, the obligational aspects are different. To be sure, an agency whose acquisitions are funded by fiscal-year appropriations may well find itself in a bind. In many cases, the agency will already have received appropriations for the acquisition, and they may expire if they cannot be obligated until after the award is determined.[38] E.g., United States v. Oregon Ry. & Nav. Co., 16 F. 524, 530 (C.C.D. Ore. 1883) (recognizing that funds previously appropriated for the acquisition in question may already have lapsed). Be that as it may, while we have found no decision which directly addresses the distinction between declaration of taking and "complaint only" condemnation for obligational purposes, it seems apparent, consistent with the theory underlying 31 U.S.C. § 1501(a), that a recordable obligation in a "complaint only" condemnation does not arise until the government tenders payment because the United States is not obligated to pay the award.

7. Expenses Incident to Real Property Acquisition

a. Expenses Incident to Title Transfer

Various expenses in addition to the purchase price arise in connection with the acquisition of real property. We have previously discussed one—the cost of procuring evidence of title. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 provides for several others. Section 303 of the URA, 42 U.S.C. § 4653, directs acquiring agencies to reimburse property owners, "to the extent the head of such agency deems fair and reasonable," for certain expenses which are "necessarily incurred."

Subsection (1) of 42 U.S.C. § 4653 authorizes "recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States." Recording fees had long been recognized as an authorized expense, chargeable to the appropriation from which the purchase price is paid. A-33604, October 11, 1930. A state tax on gain from the sale of property, in the

[38] If, as 42 U.S.C. § 4651 directs, you must try to purchase before you resort to condemnation, the money must be available to obligate in case the purchase negotiations succeed. Of course, no-year appropriations, or multiple-year appropriations with an adequate period of availability, will solve the problem.

nature of a capital gains tax, is not reimbursable, either as a "transfer tax" or as a "similar expense." Collins v. United States, 946 F.2d 864 (Fed. Cir. 1991).

Subsection (2) authorizes "penalty costs for prepayment of any pre-existing recorded mortgage entered into in good faith encumbering such real property." This assumes an actual prepayment of a mortgage which provides a prepayment penalty. It does not apply to expenses incident to a "renegotiation" entered into as an alternative to prepaying a low-interest loan. Schoellkopf v. United States, 11 Cl. Ct. 447 (1987).

Subsection (3) authorizes the payment of:

> "the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier."

As a general proposition, land owned by the United States is exempt from state and local property taxes. Van Brocklin v. Tennessee, 117 U.S. 151 (1886). The inclusion of subsection (3) in 42 U.S.C. § 4653 evolved from the way most jurisdictions assess property taxes. Commonly, the process begins on a specified date, with a lien attaching as of that date, even though the precise amount of the assessment has not yet been determined. Thus, when the United States purchases real property, there may already be a tax lien covering some period beyond the date of title transfer.

In United States v. Alabama, 313 U.S. 274 (1941), the Supreme Court held that the lien could not be enforced against the United States, but that it nevertheless remained valid. The result was that the United States did not have clear title, a problem if the land was later to be sold. The Comptroller General held in a series of decisions, both before and after Alabama, that (1) the question of whether to discharge a prior lien in order to obtain a more marketable title was within the discretion of the acquiring agency, and (2) if the agency determined that discharge of the lien by payment of the taxes would further the purpose for which the land was acquired, the land acquisition appropriation was available. See 19 Comp. Gen. 768 (1940); B-108401, April 7, 1952; B-46548, January 26, 1945; B-21817, February 12, 1942.

The governmentwide regulations issued by the Department of Transportation instruct agencies to, whenever feasible, pay the items listed in 42 U.S.C. § 4653 directly rather than having the owner pay and then seek reimbursement. 49 C.F.R. § 24.106(b).

Taxes attributable to time periods prior to title transfer are the responsibility of the former owner, not the government. GAO has, however, approved a consensual arrangement whereby, in order to qualify the deed for recording, the acquiring agency would pay the outstanding taxes directly, deduct the amount paid from the purchase price, and then pay the balance to the seller. 10 Comp. Gen. 92 (1930). GAO has also approved outright payment of the taxes in a few situations where payment by the former owner was not a realistic option. 15 Comp. Gen. 179 (1935) (property, mortgaged to government to secure a loan, obtained by foreclosure); 6 Comp. Gen. 587 (1927) (property purchased at execution sale to satisfy judgment against former owner); B-65104, May 19, 1947 (donated property).

b. Expenses Incident to Litigation

(1) Attorney's fees

Attorney's fees and expenses are not viewed as an element of just compensation. E.g., Dohany v. Rogers, 281 U.S. 362 (1930). Thus, attorney's fees and expenses are recoverable from the United States in condemnation cases only to the extent authorized by statute. Compensation is "a matter of legislative grace rather than constitutional command." United States v. Bodcaw Co., 440 U.S. 202, 204 (1979). Currently, two statutes authorize fee recovery in condemnation cases in specified situations—section 304 of the Uniform Relocation Act, 42 U.S.C. § 4654, and the judicial portion of the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

Under 42 U.S.C. § 4654(a), a property owner can recover reasonable costs actually incurred in condemnation proceedings, including reasonable attorney, appraisal, and engineering fees, in two situations: (1) if the final judgment is that the federal agency cannot acquire the property by condemnation (for example, if the court finds the condemnation unauthorized), or (2) if the United States abandons the proceedings. Awards made under 42 U.S.C. § 4654(a) are paid from the appropriations of the acquiring agency. 42 U.S.C. § 4654(b). The primary effect of 42 U.S.C. § 4654(a) is to assure that the landowner in a "complaint only" condemnation is not left "holding the bag" if the award turns out to be more than the agency is willing or able to pay.

Under 42 U.S.C. § 4654(c), the successful plaintiff in an inverse condemnation suit, whether by judgment or settlement, can recover the same types of fees and expenses as under section 4654(a). Awards under section 4654(c) are generally payable from the permanent judgment appropriation (31 U.S.C. § 1304). The standards the Court of Federal Claims applies in making awards under subsection (c) are discussed in Foster v. United States, 3 Cl. Ct. 738 (1983). The court has been critical of subsection (c)'s potential for excessive and disproportionate awards, suggesting that another look by Congress might be in order. Cloverport Sand & Gravel Co. v. United States, 10 Cl. Ct. 121, 127 (1986).[39]

Subsection (a) of 42 U.S.C. § 4654 applies only to real property. Subsection (c) applies to personal property as well as real property. Pete v. United States, 569 F.2d 565 (Ct. Cl. 1978).

Fees and expenses under 42 U.S.C. § 4654 are not available in the case of a legislative taking. Rocca v. United States, 500 F.2d 492 (Ct. Cl. 1974); Georgia-Pacific Corp. v. United States, 640 F.2d 328, 367 (Ct. Cl. 1980); Miller v. United States, 620 F.2d 812, 840-841 (Ct. Cl. 1980); Hedstrom Lumber Co. v. United States, 7 Cl. Ct. 16, 34 (1984).

In direct condemnation cases where the United States gets the land, section 4654 does not apply, but fees may be awarded in certain cases under 28 U.S.C. § 2412(d), the "judicial half" of the Equal Access to Justice Act.

During the "first life" of the Equal Access to Justice Act (1981-1984), the courts were divided over whether condemnation cases were covered, with the majority holding that they were not. The "reincarnated" version enacted in 1985 makes it clear that condemnation cases are intended to be covered. For a landowner to

[39]Cloverport awarded $9,000 as just compensation and over $76,000 in fees and expenses. Foster is another example ($28,000 just compensation, $186,000 fees and expenses).

be entitled to fees and expenses under 28 U.S.C. § 2412(d), the following tests must be met:

- The landowner must meet the eligibility criteria of 28 U.S.C. § 2412(d)(2)(B).
- The landowner must be the prevailing party. The term "prevailing party" has a special definition for eminent domain cases—the party whose valuation testimony in court is closer to the amount of the ultimate award. 28 U.S.C. § 2412(d)(2)(H).
- The court must find that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(A).
- The case must proceed to final judgment. Settlements are expressly excluded. 28 U.S.C. § 2412(d)(2)(H).

Awards under 28 U.S.C. § 2412(d) are paid from the appropriations of the acquiring agency. 28 U.S.C. § 2412(d)(4).

(2) Litigation expenses

In Chapter 17, we discuss in more detail the treatment of "litigation expenses"—expenses incurred by the United States (as opposed to expenses incurred by the opposing party which may be assessed against the United States) in preparing and conducting litigation, such as expenses of witnesses, court fees, process serving expenses, document printing and reproduction expenses, cost of transcripts, etc. The general rule is that litigation expenses are chargeable to the agency conducting the litigation, which is usually the Department of Justice.

The rule applies equally to litigation relating to real property acquisition, such as condemnation proceedings[40] and actions to quiet title.[41] Where litigation expenses are chargeable to Justice Department appropriations under this rule, appropriations of the acquiring agency are not available. As noted earlier in this chapter, the rule no longer applies to the expenses of obtaining title evidence.

[40] E.g., 18 Comp. Gen. 592, 593-594 (1939); 12 Comp. Dec. 304 (1905); 10 Comp. Dec. 538 (1904); 9 Comp. Dec. 793 (1903).

[41] 32 Comp. Gen. 118 (1952); 18 Comp. Gen. 592 (1939).

The fees and expenses of expert witnesses in land condemnation cases appointed by the court under Rule 706, Federal Rules of Evidence, are regarded as litigation expenses payable by the Justice Department, or by the agency conducting the litigation where Justice is not involved. 58 Comp. Gen. 259 (1979). See also 59 Comp. Gen. 313 (1980); 1 Op. Off. Legal Counsel 175 (1977); 1 Op. Off. Legal Counsel 168 (1977).

Under Rule 71A(h), Federal Rules of Civil Procedure, the court in a condemnation case may direct that the issue of just compensation be determined by a panel of land commissioners. If the proceeding is recorded, attendance fees of the court reporter (see 28 U.S.C. § 753) are not litigation expenses but are payable by the Administrative Office of the United States Courts from judiciary appropriations. 55 Comp. Gen. 1172 (1976). The cost of transcripts furnished to the court or to the land commissioners is considered covered by the reporter's salary or, for contract reporters, is determined under the provisions of the governing contract. Id.

C. Relocation Assistance

1. Uniform Relocation Act: Introduction and Overview

In government usage, the term "relocation assistance" can mean two different things—(1) allowances payable to federal employees incident to change of duty station, or (2) assistance to persons forced to relocate as a result of federal or federally financed programs or projects. Our concern here is the second type.

When private property is taken by eminent domain, hardship often follows. Neighborhoods may be disassembled, businesses may be forced to close. At an absolute minimum, individuals and businesses may be uprooted against their will. The "just compensation" mandated by the Fifth Amendment often does not and cannot provide adequate redress. For example, a tenant renting a house or apartment from month to month would most likely get nothing except an eviction notice.

While relatively few government agencies conduct or finance programs which produce significant displacements, the consequences of these activities by those which do are widespread. In fiscal year 1972, for example, a GAO study found that programs administered by the Federal Highway Administration, the Department of Housing and Urban Development, and the Army Corps of Engineers (which together accounted for 99 percent of federal and federally funded displacements for that year) resulted in the relocation of approximately 119,000 people. Differences in Administration of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, B-148044, June 7, 1973, at 6.

Congress has long recognized that the federal government has a major responsibility in the treatment of those displaced by federal programs or federal dollars. Prior to 1970, it approached the problem piecemeal by including relocation assistance provisions in a number of different program statutes. Although this was better than nothing, treatment under the various provisions was far from uniform. Uniformity is important because, from the perspective of the person or business being uprooted, it makes very little difference which federal agency or program is on the administering end of the boot.

In early 1971, after a decade of study, Congress enacted an important piece of legislation with an awkward but descriptive title: the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), Pub. L. No. 91-646, 84 Stat. 1894 (1971). The law was amended substantially in 1987 by the Uniform Relocation Act Amendments of 1987, Pub. L. No. 100-17, title IV, 101 Stat. 132, 246, which went into effect in April 1989.

The URA consists of three titles. Title I (42 U.S.C. §§ 4601-4604) is entitled "General Provisions." Section 101, 42 U.S.C. § 4601, defines a number of terms used in the act. Several of the more important ones—"displaced person," "comparable replacement dwelling," "Federal financial assistance"—will be discussed in detail later. Title III (42 U.S.C. §§ 4651-4655), consisting primarily of federal real property acquisition policy and the authorization for the payment of various expenses, has been covered previously in this chapter.

Title II (42 U.S.C. §§ 4621-4638) is entitled "Uniform Relocation Assistance."[42] It starts with section 201, 42 U.S.C. § 4621, which sets forth congressional findings and establishes the underlying policy and purpose of the legislation. Subsection (b), 42 U.S.C. § 4621(b), provides:

> "This [title] establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance. The primary purpose of this [title] is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons."

The stated intent is to provide equal treatment for persons similarly situated, while also taking into account their "unique circumstances." 42 U.S.C. § 4621(c)(2).

The remainder of Title II consists of the operational provisions, which outline the types of assistance authorized. The key "benefit provisions" are:

- Section 202 (42 U.S.C. § 4622)—moving and related expenses,
- Sections 203 and 204 (42 U.S.C. §§ 4623 and 4624)—replacement housing for homeowners and tenants, respectively,
- Section 205 (42 U.S.C. § 4625)—advisory services, and
- Section 206 (42 U.S.C. § 4626)—housing replacement by federal agency as "last resort."

Section 210, 42 U.S.C. § 4630, extends the provisions of 42 U.S.C. §§ 4622-4625 (but not 4626) to any nonfederal entity (state, local, private) operating with federal financial assistance. Section 216, 42 U.S.C. § 4636, provides that Title II payments are not to be considered income for purposes of federal income taxation or for determining eligibility for assistance under the Social Security Act or any other federal law except low-income housing assistance.

[42]Much of Title II was patterned after the relocation provisions of the Federal-Aid Highway Act of 1968, which the URA repealed. See 23 U.S.C. §§ 501-511 (1964 ed., Supp. V 1969). Interpretive case law arising during the brief life of these provisions may therefore still be useful. Lathan v. Volpe, 455 F.2d 1111, 1123 (9th Cir. 1971). See also Bourne v. Schlesinger, 426 F. Supp. 1025 (E.D. Pa. 1977); 52 Comp. Gen. 300 (1972).

The original law focused on displacements resulting from eminent domain acquisitions. Experience showed that, if the goal was to help displaced individuals, families, and businesses, this was too narrow. The 1987 amendments broadened the scope to embrace virtually all federal or federally assisted acquisitions, as well as certain non-acquisition displacements.

A significant weakness of the 1970 law was its failure to provide for centralized administration. Initially, the President assigned the role of providing some centralized guidance and coordination to the Office of Management and Budget, transferring this role to the General Services Administration in 1973, subject to OMB's policy oversight. Nevertheless, since no single agency had the legal authority to centrally direct and oversee governmentwide relocation procedures, each agency was free to develop its own regulations, and the uniformity which the 1970 legislation sought was not achieved.[43] In 1985, the President assigned lead responsibility to the Department of Transportation. However, there was still no legal basis for Transportation to regulate the other agencies so, the following year, the executive branch turned to a "common rule" (set of regulations published verbatim by 17 different agencies in 17 different places). 51 Fed. Reg. 7000 (February 27, 1986). Congress came to the rescue in the 1987 amendments by statutorily designating Transportation as "lead agency" (42 U.S.C. § 4601(12)) and by enacting a new 42 U.S.C. § 4633 directing Transportation to issue uniform implementing regulations. Those regulations are found at 49 C.F.R. Part 24. Within Transportation, the responsibility is assigned to the Federal Highway Administration. 49 C.F.R. § 24.2(l).

2. The Threshold Determination: Meaning of "Displaced Person"

Section 101(6) of the URA, 42 U.S.C. § 4601(6), defines "displaced person." This is the threshold test that must be met before applying any of the operational provisions. In other words, before you can determine whether you are entitled to moving expenses or replacement housing benefits, you must first qualify as a displaced person under the statutory definition. Of course you must be a

[43]See Changes Needed in the Relocation Act to Achieve More Uniform Treatment of Persons Displaced by Federal Programs, GAO/GGD-78-6 (March 8, 1978); Differences in Administration of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, B-148044, June 7, 1973.

“person” before you can be a “displaced person,” so the statute first defines “person” to mean “any individual, partnership, corporation, or association.” 42 U.S.C. § 4601(5).

Section 4601(6) then defines “displaced person” as “any person who moves from real property, or moves his personal property from real property” in two types of situation. First is “as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance.” The second type of situation is permanent displacement of a person who is a residential tenant, operates a small business or a farm, or erects and maintains outdoor advertising billboards, “as a direct result of rehabilitation, demolition, or such other displacing activity as the lead agency may prescribe, under a program or project undertaken by a Federal agency or with Federal financial assistance.” The original 1970 definition was limited to acquisitions, essentially the first part of the current definition. The 1987 amendments added the nonacquisition activities in recognition of the fact that the effect on the person forced to relocate is the same.

Note that there are several elements to the definition. First, you must either move from real property or move personal property from real property. Second, the move must result directly from a written notice of intent to acquire, or the actual acquisition of, the real property, or from an authorized nonacquisition activity. Third, the displacing activity must be in connection with a program or project undertaken or financially assisted by a federal agency. All of these elements must be present.

When the displacing activity is acquisition, this typically will mean the acquisition of fee simple title, that is, outright ownership. Routine leasing transactions are not included. Thus, where a building is leased to the government in an open market transaction without condemnation or the threat of condemnation, tenants whose leases are not renewed or whose tenancies are terminated by their landlord are not “displaced persons” for purposes of the URA. 54 Comp. Gen. 841 (1975). Restated, an open-market lease is not an “acquisition” within the scope of 42 U.S.C. § 4601(6). Similarly, if “acquisition” generally contemplates transfer of title, then the acquisition of easements normally will not produce “displaced persons.” See, e.g., 58 Comp. Gen. 559 (1979).

Although a lease is normally not an acquisition for purposes of the URA, a lease-construction transaction may be. The legislative history of the 1970 enactment makes it clear that persons displaced by government lease-construction projects are intended to be covered. H.R. Rep. No. 91-1656, 4-5 (1970), reprinted in 1970 U.S.C.C.A.N. 5850.[44] The concept is illustrated in 51 Comp. Gen. 660 (1972). The General Services Administration had signed an agreement to lease a building to be constructed on a tract of land in Alexandria, Virginia. The land had been used as a trailer park. Shortly after the agreement was signed, the owner of the land notified the tenants to vacate. It was held that the transaction amounted to a government lease-construction project for URA purposes, and that tenants who vacated after the agreement was signed qualified as "displaced persons." The decision was discussed and explained further in B-173882, June 8, 1972. However, tenants who had moved from the trailer park before the agreement was signed could not qualify. 54 Comp. Gen. 819 (1975). They were not displaced by a written order to vacate,[45] nor were they displaced "as a result of the acquisition" of the property. URA benefits are not available to "persons who vacate property in the mere anticipation or expectation that there may be an acquisition by the United States." Id. at 822.

Section 4601(6) refers to acquisition "in whole or in part." The court in Beaird-Poulan, Div. v. Dept. of Highways, 441 F. Supp. 866 (W.D. La. 1977), aff'd per curiam, sub nom. Beaird-Poulan, Inc. v. Dept. of Highways, 616 F.2d 255 (5th Cir. 1980), cert. denied, 449 U.S. 971 (1981), found that this referred to spatial divisions rather than components of ownership. The state highway department had taken a portion of a tract of land owned by Beaird-Poulan, a chain saw manufacturer. The taking severed the property into two roughly equal tracts. Although no part of the existing manufacturing facility was located on the lands actually taken, the company was able to establish that it had previously made management decisions to

[44]This is the report of the House Public Works Committee on the bill which became the URA. It contains much useful explanatory material and has been cited frequently both by GAO and by the courts.

[45]Under the 1970 legislation, entitlement to benefits was triggered by actual acquisition or by a written order to vacate. The 1987 revision changed "written order to vacate" to "written notice of intent to acquire."

substantially expand its physical plant due to increased production needs, but that it was now forced to relocate in order to do so, as a result of the taking. In these circumstances, the court held that Beaird-Poulan was a "displaced person."

Under the statutory definition, when acquisition is the displacing activity, displacement must result from either the actual acquisition of the property or a written notice of intent to acquire. If displacement occurs as a result of a written notice of intent to acquire, failure to ultimately acquire the real property will not defeat the entitlement to benefits, as long as the notice was generated by a proposed acquisition. See Alexander v. HUD, 441 U.S. 39, 59 (1979); H.R. Rep. No. 91-1656, at 4.[46]

The acquisition or notice must be "for" a federal or federally funded program or project. In Alexander v. HUD, 441 U.S. 39 (1979), the Supreme Court held that, when HUD acquires property upon default on federally insured loans, tenants displaced by the acquisition are not displaced persons within the meaning of 42 U.S.C. § 4601(6). Random default acquisitions are not intended to further a federal program or project. Id. at 63 and 65. Similar lower court decisions are Caramico v. Secretary of Housing and Urban Development, 509 F.2d 694 (2d Cir. 1974), and Blount v. Harris, 593 F.2d 336 (8th Cir. 1979). As the Caramico court pointed out, default acquisitions represent the failure of the program rather than its desired result. 509 F.2d at 699. The URA, noted the court, "contemplates normal government acquisitions, which are the result of conscious decisions to build a highway here or a housing project or hospital there." Id. at 698.

As noted previously, persons who move without a written notice of intent to acquire and prior to actual acquisition, based on a mere expectation of acquisition, will not qualify as displaced persons. 54 Comp. Gen. 819 (1975). A case making essentially the same point is Messer v. Virgin Islands Urban Renewal Board, 623 F.2d 303 (3d Cir. 1980). However, there are situations in which a move without a written notice and prior to actual acquisition will qualify.

[46]These authorities address the issue in the context of the now obsolete "order to vacate" language. There is no reason why the 1987 change to "notice of intent to acquire" should produce a different result.

In a 1975 decision, for example, GAO concluded that a person who moves after the government has made a firm purchase offer may be said to have moved "as a result of the acquisition" of the property if the acquisition is subsequently completed by purchase or condemnation. 55 Comp. Gen. 595 (1975). Once the offer is made, there is more of a commitment by the United States to acquire the property. The decision pointed out, however, that the mere authorization and appropriation of funds for the acquisition is not sufficient "commitment" by the United States to justify a move under section 4601(6). Id. at 596-97. See also Lowell v. Secretary of Housing and Urban Development, 446 F. Supp. 859 (N.D. Cal. 1977) (agency regulation excluding from eligibility persons who moved prior to execution of federal contract or federal approval of project budget upheld). The DOT regulations recognize the concept of 55 Comp. Gen. 595 by including in the definition of displaced person one who moves as a direct result of the initiation of negotiations for acquisition of the property. When there is no written notice of intent to acquire, initiation of negotiations means delivery of the agency's initial written offer. 49 C.F.R. §§ 24.2(g)(1)(i), 24.2(k).

The case of Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1972), illustrates a different type of "acquisition." The Department of Transportation had provided by regulation for "hardship acquisitions" in highway projects. Under this procedure, once the state had selected a corridor, a property owner could request immediate purchase of his property by the state upon a showing that undue hardship would result from following the standard procedure of deferring acquisition until after federal approval of the design. Applying the agency's regulations, the court viewed the "hardship sale" as an acquisition for purposes of 42 U.S.C. § 4601(6), notwithstanding that the government had not yet committed itself to the project.

Under the original 1970 legislation, a long line of cases established that the displacement must be by a governmental entity (federal, state, or local); a person displaced by a nongovernmental entity (private party) was not a displaced person and therefore not entitled to URA benefits, even though the program or project was federally funded. E.g., Conway v. Harris, 586 F.2d 1137 (7th Cir. 1978); Moorer v. HUD, 561 F.2d 175 (8th Cir. 1977), cert. denied, 436 U.S. 919 (1978). The 1987 amendments changed the focus of the inquiry by adding the nonacquisition activities and by expanding the definition of "displacing agency" (42 U.S.C. § 4601(11)) to include anyone carrying out a program or project with federal financial assistance, regardless of the presence or absence of the power of eminent domain. Thus, for acquisition-based displacements, the key question is no longer the identity of the party acquiring the property, but whether it received federal financial assistance.

In assessing the continued validity of cases decided under the pre-1987 law, it is therefore necessary to apply the revised definitions and the appropriate version of the DOT regulations. Conway v. Harris, for example, had found the URA inapplicable to residential tenants displaced from property acquired by a private party who intended to rehabilitate the property with HUD "section 8" financial assistance. Under the revised law, the acquisition itself still would not qualify as a displacing activity because it was privately funded. However, since rehabilitation is one of the authorized nonacquisition activities that can trigger entitlement to benefits, the Conway plaintiff would presumably now be covered. Other cases in this category include Isham v. Pierce, 694 F.2d 1196 (9th Cir. 1982) (tenant displaced by private owner for rehabilitation to be financed by loan from HUD), and Devines v. Maier, 665 F.2d 138 (7th Cir. 1981), cert. denied, 469 U.S. 836 (1984)(tenants evicted from housing found to be unfit for human habitation under federally assisted housing code enforcement program).

It is significant that the plaintiffs in the three cases cited in the preceding paragraph were tenants, not owners. The conference report on the 1987 amendments stressed that the expanded definitions are not intended to confer benefits on an owner who voluntarily sells in a noncoercive sale. In contrast, the tenant who is involuntarily evicted as a result of that sale is covered. H.R. Conf. Rep. No. 100-27, at 246 (1987), reprinted at 1987 U.S.C.C.A.N. 122, 230.

Two cases which appear to remain valid under the revised analysis are Austin v. Andrus, 638 F.2d 113 (9th Cir. 1981), and Parlane Sportswear Co. v. Weinberger, 381 F. Supp. 410 (D. Mass. 1974), aff'd, 513 F.2d 835 (1st Cir. 1975), cert. denied, 423 U.S. 925 (1975). Austin denied the claim of members of the Navajo Indian tribe who were forced to relocate when the tribe leased to a coal mining company mining rights on a portion of the reservation. In the Parlane case, Tufts University owned a building in Boston and had leased several floors to a clothing manufacturer. Upon expiration of the lease, Tufts evicted its tenant in order to establish a Cancer Research Center funded by grants from the (then) Department of Health, Education, and Welfare. The clothing manufacturer was held not entitled to URA benefits. Even under the new analysis, there was neither an acquisition by anyone nor an authorized nonacquisition activity. As another court put it in a somewhat different context, there will always be some losses, and the URA is intended as a supplement, not a guarantee. Pietroniro v. Borough of Oceanport, 764 F.2d 976, 980 (3d Cir. 1985), cert. denied, 474 U.S. 1020 (1985).

The Comptroller General considered an unusual variation in B-213033, August 7, 1984. A private organization proposed to purchase some land and then donate it to the Veterans Administration to be used for the expansion of a VA cemetery. The organization would clear the land of all structures prior to transfer of title. The question was whether existing property owners and tenants would be entitled to claim relocation benefits from the VA. Based on the URA's legislative history and available precedents, GAO said yes, concluding that the transaction could be viewed as an acquisition of property for a federal program.

Thus far, we have been talking about being displaced from the actual property that is being acquired, rehabilitated, etc. The statute recognizes situations in which the property from which you move and the property which is being acquired or rehabilitated do not have to be the same. Under the statutory definition of displaced person, a person can qualify for two of the URA benefits—moving expenses and advisory services—if that person moves from real property, or moves his personal property from real property, as a direct result of the federal or federally funded acquisition of, or authorized nonacquisition activity on, some other real property on which that person conducts a business or farm operation. 42 U.S.C. § 4601(6)(A)(ii). An example from the 1970 legislative history is "the acquisition of right-of-way for a highway improvement in a remote locality [which] may include a general store and gas station, but exclude the operator's nearby dwelling or storage facility." H.R. Rep. No. 91-1656, at 5 (1970). Another example is Forman's Dairy Palm Nursery v. Florida Department of Transportation, 608 So. 2d 76 (Fla. Dist. Ct. App. 1992) (land used by tree nursery reclaimed by owner as result of taking for highway construction).

Finally, what about absentee landlords? If the absentee landlord has personal property to be moved from the acquired or otherwise affected real property, then he would be covered under the plain terms of 42 U.S.C. § 4601(6). However, the statute does not specify how much personal property there has to be. Thus, an absentee landlord who had left a garden rake on the acquired premises would presumably qualify. This being the case, GAO thought it inequitable to deny benefits to an absentee landlord who did not have some minimal amount of personal property to move, and found in B-148044, March 5, 1975, that the nonresident owner of an apartment building could be considered a "displaced person" even with no personal property located on the acquired real property. A state court reached a seemingly opposite conclusion in City of Mishawaka v. Knights of Columbus Home Association, 396 N.E.2d 948 (Ind. Ct. App. 1979). The DOT regulations also seem to require that there be some personal property to move, but they do not attempt to specify how much. 49 C.F.R. § 24.306(a)(1).

3. Types and Payment of Benefits

a. Moving and Related Expenses

Section 202 of the URA, 42 U.S.C. § 4622, authorizes the payment of moving and certain related expenses "[w]henever a program or project to be undertaken by a displacing agency will result in the displacement of any person." The types of benefits vary according to whether the displacement is residential or commercial.

(1) Residential displacements

A person displaced from a dwelling is entitled to receive "actual reasonable expenses" incurred in moving self, family, and personal property. 42 U.S.C. § 4622(a)(1). The types of expenses allowable are further spelled out in 49 C.F.R. § 24.301. Alternatively, the person may elect to receive a fixed "expense and dislocation allowance." 42 U.S.C. § 4622(b). The 1970 legislation prescribed the actual amounts payable. The 1987 amendment deleted the specific amounts, providing instead for the amount to be determined according to a schedule established by the Department of Transportation. Id. The DOT regulations provide for the allowance to be determined "according to the applicable schedule approved by the Federal Highway Administration." 49 C.F.R. § 24.302. The Federal Highway Administration derives its schedule from data submitted by the various state highway agencies and publishes the schedule as a Notice in the Federal Register about once every three or four years. The most recent schedule (through the date of this chapter's publication) was published in 61 Fed. Reg. 65425 (December 12, 1996).

Neither the statute nor the DOT regulations specifically address persons who move themselves rather than hire commercial movers, but there is no reason they should be excluded. The self-mover presumably has the same election as anyone else.

A person who moves onto the property after its acquisition for a project is not eligible for benefits. 49 C.F.R. § 24.2(g)(2)(ii); B-148044, January 7, 1974. The reason is that the person cannot be said to have been displaced as the result of the acquisition. An agency regulation to this effect was upheld in Lewis v. Brinegar, 372 F. Supp. 424 (W.D. Mo. 1974). However, a regulation purporting to disqualify persons who began occupancy after the initiation of negotiations was invalidated as exceeding statutory authority in Tullock v. State Highway Commission, 507 F.2d 712 (8th Cir. 1974).

(2) Commercial displacements

A person displaced from a place of business or farm also has a choice. Under 42 U.S.C. § 4622(a), he can receive moving expenses including (1) actual reasonable moving expenses, (2) actual direct losses of tangible personal property, (3) actual reasonable expenses in searching for a replacement business or farm,[47] and (4) actual reasonable expenses, not to exceed $10,000, in reestablishing a farm, small business, or nonprofit organization. The specific items allowable are spelled out in 49 C.F.R. §§ 24.303 through 24.305. Payment for losses of personal property is authorized even where the property is not relocated or the business is discontinued, not to exceed the cost of actual relocation. 42 U.S.C. § 4622(a)(2). As the 1970 legislative history points out, there may be situations where the

[47]The regulations limit this item to $1,000. 49 C.F.R. § 24.303(a)(13). There is no comparable allowance in any amount for residential displacements. 49 C.F.R. § 24.305(i) (expressly excluding expenses of searching for a replacement dwelling).

property is not suitable at the new location, or where moving it would be impractical or uneconomical. H. R. Rep. No. 91-1656, 6-7 (1970), reprinted in 1970 U.S.C.C.A.N. 5850.

Alternatively, the person may elect to receive a fixed payment under 42 U.S.C. § 4622(c), determined in accordance with the DOT regulations, of not less than $1,000 nor more than $20,000. Under 49 C.F.R. § 24.306(a), in order for a business to receive a fixed payment under subsection (c) of the statute, the agency must determine, among other things, that:

- the business cannot be relocated without a substantial loss of its existing patronage;
- the business is not part of a commercial enterprise having at least three other entities not being acquired which are under the same ownership and engaged in the same or similar business; and
- the business contributed materially to the displaced person's income during the two taxable years prior to displacement.

The various administrative determinations are designed to keep the program from becoming a giveaway, and the courts will generally uphold an agency's decisions under them as long as they are not arbitrary or capricious. In Starke v. Secretary of Housing and Urban Development, 454 F. Supp. 477 (W.D. Okla. 1977), for example, the court upheld the denial of relocation benefits to a lawyer who had moved his office to a location only three blocks from his former office and in fact closer to the courthouses in which he practiced.

The fixed payment will be equal to the average annual net earnings of the business or farm, calculated as prescribed in 49 C.F.R. § 24.306(e), subject to the statutory maximum and minimum. For a nonprofit, the payment is based on "the average of two years annual gross revenues less administrative expenses." 49 C.F.R. § 24.306(d). (The net earnings formula, as with some of the administrative determinations, used to be specified in the statute; the detail was dropped from the statute in 1987 and is now carried in the regulations.)

The rental of real property is included in the definition of "business" in 42 U.S.C. § 4601(7) and, prior to the 1987 amendments, could qualify for a subsection (c) fixed payment as long as the required determinations could be made. B-148044, November 18, 1975. While the amendments did not affect this portion of 42 U.S.C. § 4601(7), they added language to 42 U.S.C. § 4622(c) to expressly disqualify persons "whose sole business at the displacement dwelling is the rental of such property to others." The disqualification applies only to the fixed payment option and does not affect entitlement to actual expenses under 42 U.S.C. § 4622(a).

A displaced owner-occupant of a multi-family dwelling who receives income from the dwelling is displaced both from his dwelling and from his place of business for purposes of section 4622, and can receive appropriate benefits in both capacities (H.R. Rep. No. 91-1656, supra, at 8), subject to the fixed payment disqualification described above if applicable.

We have previously noted that an absentee landlord may be considered a displaced person. Naturally, if he does not move, he cannot claim actual moving expenses, but he could claim other authorized expenses as and to the extent applicable. See B-148044, March 5, 1975. (The landlord in that case was the absentee owner of an apartment building and would no longer be eligible for the fixed payment option, but the general proposition remains valid.)

b. Replacement Housing Benefits

In addition to the moving expenses authorized by 42 U.S.C. § 4622, the URA authorizes monetary payments to help displaced persons obtain adequate replacement housing. These replacement housing benefits are contained in 42 U.S.C. §§ 4623 and 4624, applicable to homeowners and tenants, respectively. As with the moving expense payments, replacement housing benefits are available only to those who qualify as displaced persons, and are in addition to any "fair market value" payments received under the eminent domain authority.

(1) Homeowners

Under 42 U.S.C. § 4623(a)(1), a person displaced from a dwelling which he owned and occupied for at least 180 days prior to the initiation of negotiations for acquisition of the property is eligible for a supplemental payment of up to $22,500. The payment consists of the following elements:

- The difference, if any, between the acquisition cost (the eminent domain "fair market value" payment) and the reasonable cost of a comparable replacement dwelling.
- An "interest differential" if the cost of new financing exceeds the interest rate on the homeowner's existing mortgage. To qualify for this payment, there must have been a valid mortgage on the acquired property for at least 180 days prior to the initiation of acquisition negotiations. The regulations provide guidance on computing the differential. See 49 C.F.R. § 24.401(d) and Appendix A to § 24.401.
- Reasonable expenses for evidence of title, recording fees, and other closing costs (but not including prepaid expenses) incident to purchase of the replacement dwelling.

Where displacement is based on an authorized nonacquisition activity, "initiation of negotiations" means the notice to the person that he or she will be displaced or, if there is no such notice, the date the person actually moves from the property. 49 C.F.R. § 24.2(k)(2).

In order to qualify for payment under section 4623(a)(1), the displaced person must purchase and occupy a replacement dwelling within one year from the date he received the final payment for acquisition, or the date the agency provided referrals to replacement housing, whichever is later. 42 U.S.C. § 4623(a)(2). The agency can extend the one-year deadline for good cause. Id. Good cause generally means some event beyond the displaced person's control. See 49 C.F.R. § 24.401(a)(2), Appendix A.

Section 4623 is based on the premise that "a displaced homeowner should not be left worse off economically than he was before displacement, and should be able to relocate in a comparable dwelling which is decent, safe and sanitary, and adequate to accommodate him." H.R. Rep. No. 91-1656, supra, at 8. An acquired dwelling is "owned" if the displaced person held fee title, a life estate, a land contract, a 99-year lease, or a lease including extension options with at least 50 years to run from the date of acquisition. 49 C.F.R. § 24.2(p)(1).

The cost of a comparable replacement dwelling establishes the upper limit of the benefit payment. 49 C.F.R. § 24.403(a). See also B-203827, October 8, 1981 (internal memorandum) (same point under prior version of regulations). To promote uniformity, the law defines "comparable replacement dwelling" as a dwelling that is:

"(A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment." 42 U.S.C. § 4601(10).

The "decent, safe, and sanitary" standard is defined in 49 C.F.R. § 24.2(f). Guidance on applying the "functionally equivalent" standard may be found in the conference report to the 1987 amendments, which added the definition. H.R. Conf. Rep. No. 100-27, at 247-248 (1987).

In order to qualify for the "interest differential," it is not necessary that the displaced person be required to obtain a mortgage on the replacement house, only that he in fact do so. In a Louisiana case, a person displaced from his dwelling for highway construction received enough from the eminent domain payment so that he could have paid cash for his replacement house. Instead, he chose to obtain a mortgage on the replacement house at an interest rate higher than that on his old mortgage. The court found that 42 U.S.C. § 4623 does not restrict eligibility to cases where there is not enough cash left over after the taking with which to purchase a replacement dwelling. The homeowner in this case was therefore entitled to an interest differential payment, subject of course to the statutory ceiling. Louisiana Department of Highways v. Coleman, 444 F. Supp. 151 (M.D. La. 1978).

The regulations recognize a "constructive occupancy" concept (49 C.F.R. § 24.403(d)), and the courts have strongly encouraged it. One court has gone so far as to suggest that the "fair and equitable treatment mandate" of the URA requires application of a constructive occupancy exception in appropriate cases. Nagi v. United States, 751 F.2d 826, 830 (6th Cir. 1985). An illustrative case is Ledesma v. Urban Renewal Agency, 432 F. Supp. 564 (S.D. Tex. 1977). The Ledesmas had built a house in their hometown of Edinburg, Texas, but Mr. Ledesma could not find sufficient work in Edinburg to enable them to pay for the house. They moved to a nearby town where Mr. Ledesma found work and rented a house. They always intended to return to the Edinburg house as soon as they could afford to do so. They retained sole control of the Edinburg house, left their furniture and household goods there, and permitted no one else to live or even stay briefly in that house. The court found that the Ledesmas owned the house for the requisite 180-day period but, due to circumstances beyond their control, did not physically occupy it during that period. Under these facts, the court found them entitled to a replacement housing payment. The constructive occupancy concept is an attempt to "mitigate what might possibly be harsh and unfair results if the 180 day requirement were blindly or mechanically imposed." Id. at 567.

In Seeherman v. Lynn, 404 F. Supp. 1318 (M.D. Pa. 1975), the Department of Housing and Urban Development had applied a constructive occupancy exception in order to authorize the payment of replacement housing benefits to homeowners who did not physically occupy their homes immediately prior to acquisition because they had been displaced by a flood. The court upheld the refusal to apply the same exception to a husband and wife who had been building a house at the time of the flood but were not "displaced" from it because they had never occupied it in the first place. Id. at 1322.

(2) Tenants and "90-day homeowners"

In enacting the URA, Congress recognized that the lack of adequate and affordable rental housing for displaced lower income individuals and families "presents the most difficult of all relocation problems." H.R. Rep. No. 91-1656, 12 (1970), reprinted in 1970 U.S.C.C.A.N. 5850. These are the persons who would generally receive nothing from the eminent domain taking. Section 204 of the Act, 42 U.S.C. § 4624, attempts to address this problem.

Under 42 U.S.C. § 4624, benefits are payable to a displaced person who (1) is not eligible to receive payments under 42 U.S.C. § 4623, and (2) lawfully occupied the dwelling from which displaced for at least 90 days prior to the initiation of the acquisition negotiations. In the case of an authorized nonacquisition displacing activity, the initiation of negotiations has the same meaning as it does for purposes of 42 U.S.C. § 4623.

The amount payable is the amount necessary to enable the displaced person to lease or rent a comparable replacement dwelling for up to 42 months, not to exceed $5,250. Payment may be in a lump sum or in periodic installments, in the agency's discretion. The regulations, 49 C.F.R. § 24.402(b), prescribe the method of calculating the amount of the benefit. The displaced person may, at his or her election, use the money as a down payment on the purchase of a "decent, safe, and sanitary replacement dwelling," in which event the agency may, again in its discretion, pay the maximum amount allowable without regard to any calculations. 42 U.S.C. § 4624(b); 49 C.F.R. 24.402(c). This latter option is designed to encourage home ownership. H.R. Rep. No. 91-1656, supra, at 12.

If a displaced tenant wishes to purchase a replacement home and seeks down payment assistance under 42 U.S.C. § 4624(b), eligibility is not affected by the fact that the tenant plans to purchase the home as co-owner with some other person who is not entitled to URA benefits. B-148044, June 18, 1975.

Benefits under 42 U.S.C. § 4624 are available not only to rental tenants but also to homeowners who cannot meet the 180-day test for benefits under 42 U.S.C. § 4623 but who have owned and occupied the displacement dwelling for at least 90 days prior to the initiation of negotiations. Ninety-day home owners who elect to purchase a replacement home cannot receive more than they would have received under 42 U.S.C. § 4623 if they had met the 180-day test. 42 U.S.C. § 4624(b).

Mobile homes present complications and are treated in 49 C.F.R. Part 24, Subpt. F. Mobile homes are considered real property in some states and personal property in others. Also, a person may own a mobile home and rent the land on which it sits, or vice-versa, and in choosing a replacement dwelling may buy one and rent the other. While there may thus be two different property interests involved, the displaced person should not receive greater benefits than the displaced owner of a stationary home in comparable circumstances. 57 Comp. Gen. 613 (1978). Under the regulations, you compute benefits separately for the dwelling and the site, applying to each the appropriate provisions of the law and regulations depending on which is owned and which is rented. However, the total replacement housing payment may not exceed the ceiling applicable to the dwelling. 49 C.F.R. § 24.505(a).

c. Advisory Services

Section 205 of the URA, 42 U.S.C. § 4625, requires agencies to provide a relocation assistance advisory program for displaced persons. The advisory services may extend to persons occupying property immediately adjacent to acquired property (42 U.S.C.

§ 4625(b)), and to short-term tenants who would not otherwise qualify as displaced persons (42 U.S.C. § 4625(f)). The advisory program was viewed as a "key element" of a successful relocation program. H.R. Rep. No. 91-1656, supra, at 13. Thus, the responsibility of an agency is not limited to merely paying appropriate benefits when claimed. There is an affirmative duty to help persons who have been or are going to be displaced, by developing and making available a variety of relocation information and assistance.

The statute lists the types of services to be included in the advisory program, and directs agencies to cooperate with one another and to coordinate their relocation activities. For example, the program should "provide current and continuing information on the availability, sales prices, and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses and farm operations." 42 U.S.C. § 4625(c)(2).

There is relatively little case law construing the advisory service requirements of 42 U.S.C. § 4625. One of the required services is to "assist a person displaced from a business or farm operation in obtaining and becoming established in a suitable replacement location." 42 U.S.C. § 4625(c)(4). This, said one court, "requires only assistance, not assistance guaranteeing a successful result." American Dry Cleaners and Laundry, Inc. v. U.S. Department of Transportation, 722 F.2d 70, 73 (4th Cir. 1983). Another court has noted that the existence of a file folder on relocation assistance does not satisfy the statute. United Family Farmers, Inc. v. Kleppe, 418 F. Supp. 591, 602 (D. S.D. 1976), aff'd, 552 F.2d 823 (1977).

d. "Last Resort" Replacement Housing

The URA places considerable emphasis on adequate replacement housing. Under 42 U.S.C. § 4625(c)(3), one of the elements agencies are to address in their advisory programs is the assurance that people will not be forced to move without first being given a reasonable opportunity to relocate to comparable housing. However, as anyone who is less than wealthy well knows, providing adequate and affordable housing is easier said than done.

Section 206 of the URA, 42 U.S.C. § 4626, has rightly been termed an "innovative" provision. Catherine R. Lazuran, Annotation, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 33 A.L.R. Fed. 9, 30 (1977). Under subsection (a), if a federal or federally assisted project "cannot proceed on a timely basis because comparable replacement dwellings are not available," the agency head is authorized to "take such action as is necessary or appropriate to provide such dwellings by use of funds authorized for such project." This may include the direct construction of new housing, the acquisition and rehabilitation of existing housing, the relocation of existing housing, and the stimulation of housing development through the use of "seed money" loans. H.R. Rep. No. 91-1656, supra, at 15; 49 C.F.R. § 24.404(c)(1). Subsection (a) also expressly authorizes agencies to exceed the payment ceilings of 42 U.S.C. §§ 4623 and 4624, but only on a case-by-case basis and for good cause in accordance with the DOT regulations. DOT has emphasized that "housing of last resort is not an independent program, but is merely an extension of the replacement housing function." 53 Fed. Reg. 27604 (July 21, 1988) (supplementary information statement on proposed uniform regulations).

An agency cannot require a displaced person to accept agency-provided housing in lieu of applicable monetary payments (just compensation payment, if any, and supplemental payment under 42 U.S.C. §§ 4623 or 4624). This can be done only if the displaced person agrees. H. R. Rep. No. 91-1656, supra, at 14-15; 49 C.F.R. § 24.404(b).

Subsection (b) of 42 U.S.C. § 4626 states:

> "No person shall be required to move from his dwelling on account of any program or project undertaken by a Federal agency or with Federal financial assistance, unless the head of the displacing agency is satisfied that comparable replacement housing is available to such person."

The statute itself is not an absolute guarantee of adequate replacement housing; it provides merely that the agency head must be "satisfied" that it is available, whatever that means. The regulations take it a step further, however. In a paragraph entitled "Basic rights of persons [being] displaced," the regulations state flatly that "no person shall be required to move from a displacement dwelling unless comparable replacement housing is available to such person." For emphasis, the next sentence states that "[n]o person may be deprived of any rights the person may have under the Uniform Act or this part." 49 C.F.R. § 24.404(b). Although its scope has yet to be judicially tested, this, especially in conjunction with the statutory definition of "comparable replacement dwelling," appears to create a substantive right of major importance.

The URA does not require that comparable replacement housing be located in the immediate neighborhood of the displacement housing, Mejia v. U.S. Department of Housing and Urban Development, 518 F. Supp. 935, 938 (N.D. Ill. 1981), aff'd, 688 F.2d 529 (7th Cir. 1982), or even in the same county, Katsev v. Coleman, 530 F.2d 176, 180-181 n.7 (8th Cir. 1976). Thus, the lack of suitable replacement housing in the immediate neighborhood is not sufficient to trigger the "last resort" housing authority. Mejia, 518 F. Supp. at 938. In light of the 1987 addition of the statutory definition of "comparable replacement dwelling," one element of which is that the housing be in a location generally not less desirable with respect to the displaced person's place of employment, the outer boundaries of this concept remain to be determined.

Clearly, one effect of the replacement housing program can be to change the displaced person's status from tenant to homeowner. E.g., 42 U.S.C. § 4624(b); 49 C.F.R. § 24.404(c)(1)(viii). The reverse possibility raises a very thorny problem. In B-148044, July 18, 1977, GAO considered this question: Does 42 U.S.C. § 4626 amount to a guarantee of continued home ownership, or may rental housing be considered appropriate replacement housing for displaced homeowners? GAO surveyed agencies with the most relocation experience, and found considerable disagreement. GAO also found both the statute and the legislative history ambiguous. On balance, the decision concluded that the use of rental housing under 42 U.S.C. § 4626 when home ownership is not feasible is not legally precluded, although it is obviously an undesirable option and should not be encouraged.[48] Recognizing that there is room for legitimate disagreement, GAO recommended congressional clarification, and reiterated its recommendation in its report entitled Changes Needed in the Relocation Act to Achieve More Uniform Treatment of Persons Displaced by Federal Programs, GAO/GGD-78-6 (March 8, 1978).

[48]The decision also involved the question of whether 42 U.S.C. § 4626 is subject to the monetary ceiling of 42 U.S.C. § 4623, a question on which there also was considerable disagreement and which was resolved in the 1987 amendments to the statute.

e. Federally Assisted Programs and Projects

The relocation benefits we have been discussing apply not only to federal programs but also to nonfederal programs carried out with federal financial assistance. With respect to nonfederal programs, the federal agency providing the assistance has a limited oversight role. Under section 210 of the Uniform Relocation Act, 42 U.S.C. § 4630, a nonfederal displacing agency must provide "satisfactory assurances" that it will comply with 42 U.S.C. §§ 4622 (moving and related expenses), 4623 and 4624 (replacement housing benefits), and 4625 (advisory services) as a condition of any grant, contract, or agreement under which federal dollars will be available to pay all or any part of the cost of any program or project which will displace anyone. It must also provide "satisfactory assurances" that, except for certain emergency situations, comparable replacement housing will be available within a reasonable time prior to displacement.

A "satisfactory assurance" for purposes of this provision requires some reasonable factual basis, but it does not mean a guarantee that the housing in fact exists. Katsev v. Coleman, 530 F.2d 176, 181 (8th Cir. 1976); Battison v. City of Niles, 445 F. Supp. 1082, 1090-91 (N.D. Ohio 1977).

To trigger 42 U.S.C. § 4630, it is not necessary that federal dollars be used for the specific acquisition. It is sufficient that the displacing agency's program or project which will result in the acquisition (or authorized non-acquisition activity) is federally assisted. H.R. Rep. No. 91-1656, at 4 (1970) reprinted in 1970 U.S.C.C.A.N. 5850; Lake Park Home Owners Association v. U.S. Department of Housing and Urban Development, 443 F. Supp. 6 (S.D. Ohio 1976). As the same court explained a few years later, however, the mere existence of federal assistance is not enough. There must be "some present nexus" between the federally assisted program or project and the displacing activity. Day v. City of Dayton, 604 F. Supp. 191, 197 (S.D. Ohio 1984).

A 1976 decision, B-180812, March 25, 1976, discussed the application of 42 U.S.C. § 4630 to waste treatment facility grants by the Environmental Protection Agency. The decision made two important points:

- Section 4630 does not require that URA benefits be strictly limited to cases where displacement occurs after the commitment of federal financial assistance. Rather, the state or municipal grantee should be required to provide relocation benefits to those displaced from any site which, at the time of acquisition (or at any time thereafter prior to actual displacement), was planned as the site of a federally assisted facility. GAO recognized the risk to the grantee in that relocation costs will not be reimbursed if the assistance is ultimately not granted. However, this approach was viewed as most consistent with the intent of the URA.

- If a grant application is received from a state or municipality which has already acquired property or displaced persons without providing relocation benefits, the applicant should be required to retroactively "cure" the noncompliance. If substantial compliance with the URA cannot be achieved in this manner, the application should be denied.

The 1987 amendments to the URA added an alternative to the "satisfactory assurance" approach of 42 U.S.C. § 4630. A state agency may certify that it will operate in accordance with state laws that accomplish the purpose and effect of the URA. A federal agency fulfills its responsibility under the URA by accepting this certification. The Department of Transportation, in coordination with the program agency, periodically monitors state compliance. If the state agency violates its certification, the program agency may withhold its approval of financial assistance, or may rescind its approval of the certification. 42 U.S.C. § 4604; 49 C.F.R. § 24.4(a)(3) and Part 24, Subpt. G.

"Federal financial assistance" for URA purposes is defined as "a grant, loan, or contribution provided by the United States" but expressly excludes (1) any federal guarantee or insurance, and (2) any interest reduction payment to an individual in connection with the purchase and occupancy of a residence by that individual. 42 U.S.C. § 4601(4); 49 C.F.R. § 24.2(j). Thus, if the only federal financial involvement is in the form of a guarantee or insurance, the URA does not apply regardless of who displaces whom from what. E.g., Dawson v. U.S. Department of Housing and Urban Development, 428 F. Supp. 328, 332 (N.D. Ga. 1976), aff'd, 592 F.2d 1292 (5th Cir. 1979) (assistance under section 236 of the National Housing Act is encompassed by the "guarantee or insurance" exclusion).

A question lurking in the bushes is the extent to which the term "federal financial assistance" does or does not include block grants.

The genesis of the question is a series of cases holding the URA inapplicable where the only federal funds involved were funds provided under the now defunct general revenue sharing program. The reason was that revenue sharing funds were intended to be provided with no "federal strings"; they were not associated with any particular project, but could be used by the states as they saw fit. Goolsby v. Blumenthal, 590 F.2d 1369 (5th Cir. 1979), cert. denied, 444 U.S. 970; B-148044, December 10, 1973; B-130515-G.94, March 7, 1979.

It is arguable that this analysis applies, at least to some extent, to block grant programs. For example, one court has found the URA inapplicable where the federal assistance consisted of Community Development Block Grant (CDBG) funds, stating that "the URA is only applicable when the federal financial assistance is provided . . . for a specific program or project." Isham v. Pierce, 694 F.2d 1196, 1204 (9th Cir. 1982). See also Young v. Harris, 599 F.2d 870, 878 (8th Cir. 1979). Other cases have involved CDBG funds without addressing the issue. E.g., Gomez v. Chody, 867 F.2d 395 (7th Cir. 1989).

Relocation costs incurred directly by a federal agency are treated simply as part of the cost of the program or project. Relocation costs incurred by a nonfederal displacing agency are reimbursable from the federal agency which is providing the financial assistance "in the same manner and to the same extent" as other program or project costs. 42 U.S.C. § 4631(a). Thus, for example, if the relevant program legislation has a matching fund requirement, it will apply to allowable relocation costs. H.R. Rep. No. 91-1656, supra, at 17. However, if state eminent domain law provides for payments which "have substantially the same purpose and effect" as URA benefits, those payments will not constitute allowable program or project costs. 42 U.S.C. § 4631(b). The 1987 amendments extended this anti-duplication provision to apply the "substantially the same purpose and effect" concept to other federal payments as well. Examples may be found in H.R. Conf. Rep. No. 100-27, at 255 (1987).

Subsection (c) of 42 U.S.C. § 4631 required that grants and contracts with state agencies executed prior to the effective date of the URA be amended to include URA benefits. In 51 Comp. Gen. 267 (1971), the Comptroller General advised the Department of Housing and Urban Development that contracts which provided for full federal funding of certain relocation costs authorized by the Housing Act still had to be amended to reflect the new URA benefits, but did not have to include the cost-sharing requirements of 42 U.S.C. § 4631(a). However, where existing contracts did not include relocation payments, the amended contracts would have to reflect the subsection (a) cost-sharing requirements. B-173957, September 7, 1972.

f. Procedures and Payment

The payment of benefits under the URA is not automatic; the displaced person must apply to the proper agency. The regulations try to be user-friendly in this regard, placing the initial burden on the displacing agency. The agency is directed to give written notification to persons scheduled to be displaced, including a general description of the types of payments for which the person may be eligible and applicable procedures. 49 C.F.R. § 24.203(a). Agencies are also directed to provide reasonable assistance to help persons file their claims. 49 C.F.R. § 24.207(a). Since displaced persons often tend to be lower-income individuals and families, this is as it should be. Specific procedures are up to the individual agency.

Subject to waiver for good cause, claims should be filed within 18 months after the date of displacement or the date of the final payment for acquisition, if applicable, whichever is later. 49 C.F.R. § 24.207(d). The regulations further instruct agencies to review claims "in an expeditious manner" and to make payment "as soon as feasible" after receipt of sufficient documentation to support allowance. 49 C.F.R. § 24.207(b).

Any sound claims settlement system should include an administrative appeal process, the objective being to maximize administrative resolution and minimize the need to go to court. In the case of the URA, an appeal process is required. 42 U.S.C. § 4633(b)(3); 49 C.F.R. § 24.10. If a claim is denied in whole or in part for any reason, the agency must notify the claimant in writing, setting out the agency's appeal procedures. 49 C.F.R. § 24.207(g). If the appeal is denied in whole or in part, the agency must again provide written notification, this time advising the claimant of his or her right to seek judicial review. 49 C.F.R. § 24.10(g).

The URA authorizes advance payments in two situations. First, a federal agency, upon determining that it is necessary for the expeditious completion of a program or project, may advance the federal share of authorized relocation costs to a state agency. 42 U.S.C. § 4631(c). Second, a displaced person may, in hardship cases and upon proper application, receive advance payment of applicable relocation benefits. 42 U.S.C. § 4633(b)(2). Advance payment under section 4633(b)(2) should be "subject to such safeguards as are appropriate to ensure that the objective of the payment is accomplished." 49 C.F.R. § 24.207(c).

4. Public Utilities

A public utility will typically have two different types of facilities which it may be required to relocate. First, like any other business entity, it will have business offices—office space which it may own or lease, with desks, file cabinets, etc. With respect to these business offices, the URA applies to the utility the same as it applies to any other business entity. Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co., 464 U.S. 30, 35 (1983).

Unlike most other business entities, however, the utility has a second type of property—facilities for the transmission of telephone service, electric power, natural gas, etc., to the consumer. Perhaps the most familiar example is the ubiquitous telephone pole. With respect to these "utility facilities," the situation is more complicated. There is a common-law rule and several statutory exceptions, all of which exist side-by-side.

a. The Common Law

When a utility wishes to place transmission facilities on public property, it must first obtain permission to do so in the form of a grant of an appropriate right-of-way. A right-of-way may be in various forms, such as a license, a franchise, or an easement. The traditional form of right-of-way for utility lines has been a franchise, a form of special privilege which is more than a mere license but less than an easement. E.g., Artesian Water Co. v. Delaware Department of Highways & Transportation, 330 A.2d 432, 440 (Del. Super. Ct. 1974), modified and aff'd, 330 A.2d 441 (Del. 1974).

Under the common-law approach, the governmental entity which grants a special privilege can take it away when some paramount public need so requires. A utility receiving a franchise does so with this understanding. "[W]hen [the utility] located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made." New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453, 461 (1905). Permission to locate utility facilities on public property "does not create an irrevocable right to have such . . . facilities remain forever in the same place." Tennessee v. United States, 256 F.2d 244, 258 (6th Cir. 1958). Within this framework developed the "long-established common law principle that a utility forced to relocate from a public right-of-way must do so at its own expense." Norfolk Redevelopment and Housing Authority, 464 U.S. at 34 (citing and following New Orleans Gas Light Co.).

The earliest GAO decision applying this rule appears to be 10 Comp. Gen. 331 (1931). Underground construction of various distribution lines from the Capitol power plant to congressional office buildings necessitated the relocation of utility lines in the District of Columbia. The Comptroller General advised the Architect of the Capitol that relocation costs could not be charged to the construction appropriation, stating:

> "Rights of way or franchises granted by municipalities or by State or Federal authorities to public utility corporations, in public streets, etc., to operate their business are usually coupled with reservations that the public utility company will, upon demand of the granting authority, vacate the streets, etc., or relocate or divert its conduits, lines, etc., to meet the needs of the granting authority as they arise." Id. at 331.

Another early decision, A-38299, September 8, 1931, quoted in 44 Comp. Gen. 59, 60-61 (1964), stated the rule as follows:

> "The placing of [utility] lines on public lands must be understood as subject to the paramount needs of the United States, and when their removal becomes necessary because of interference therewith the expenses of such removal may not be charged to the United States in the absence of specific statutory authority to that effect."

A more recent decision advised the Architect of the Capitol that there was no authority to reimburse the local electric company for relocation costs incident to construction of a Library of Congress building. 51 Comp. Gen. 167 (1971). The Comptroller General discussed the rule in some detail in 18 Comp. Gen. 806 (1939), a case involving the relocation of telephone lines incident to the construction of a highway on government-owned land. The relocation of utility lines is the exercise by the United States of its inherent regulatory authority over its property. The United States has the same "police power" over federal land that the states have over state land. The legitimate exercise of a police power, at least in this context, is not a taking of a property interest for purposes of the constitutional requirement of just compensation. Thus, as long as the relocation is required for a valid public purpose, the utility must bear the cost. The decision treated the distinction between a franchise and a license as essentially immaterial. Id. at 807.

If, under the common-law rule, the government can't pay for relocating utility lines, how about relocating or altering the government facility? As you may have guessed, there is a decision on that, too. If an agency's appropriations are not available to pay a utility's relocation costs in a particular situation, they are equally unavailable for relocating or altering the government facility as an alternative. B-33911, May 5, 1943. This point is little more than the application of common sense. The decision also points out that, for purposes of the rule, it makes no difference whether the government facility was in existence when the license or permit was originally granted, or was subsequently erected.

The common-law rule has been applied with respect to all types of public lands: land in a national park, A-36464, July 22, 1931; land in a national forest, A-38299, September 8, 1931; land acquired by a federal agency for a specific project, 18 Comp. Gen. 806, cited above; and unreserved public land, B-11161, August 21, 1940. However, in 19 Comp. Gen. 608 (1939), it was found inapplicable to certain Indian lands. The land in question was Pueblo land in New Mexico, title to which, unlike the more typical reservation, was held communally by the Indians. GAO found that the lands were not "public lands" as that term had been judicially defined. 19 Comp. Gen. at 611, citing, e.g., Lane v. Pueblo, 249 U.S. 110, 113 (1919). Therefore, the United States did not have a right paramount to that of the utility, and project appropriations were available to pay utility relocation costs.

A few not very recent decisions considered licenses granted by the Federal Power Commission (FPC) under the Federal Power Act of 1920, as amended, 16 U.S.C. ch. 12. Generally, the common-law rule regarding utility relocation expenses applies. The fact that the FPC charged the licensee a fee under the statute was not material. B-33911, May 5, 1943; A-44362, December 1, 1932. In a 1955 case, however, the FPC determined that, under the terms and conditions of the specific license involved, the licensee was not obligated to bear the relocation expenses, and reimbursement was permitted under a "necessary expense" rationale. B-122171, April 5, 1955.

For purposes of determining whether an agency can pay utility relocation costs, the difference between a franchise and a license is largely immaterial. This is not true with respect to an easement, however, which, unlike a license or a franchise, is generally viewed as creating a compensable interest in land. E.g., Artesian Water Co., 330 A.2d at 440.[49] In 36 Comp. Gen. 23 (1956), GAO recognized the distinction and held that the United States could participate in utility relocation costs where the utility had been granted an easement under 43 U.S.C. § 961 over a specific location where there had been no preexisting government facility. Of course, the government can always condemn the easement. See B-13574, December 2, 1940. See also 42 Comp. Gen. 177 (1962) in which relocation costs were denied because the terms of a special use permit granted by the National Park Service were regarded as prevailing over an easement which had been granted to a utility by the party from whom the government acquired the property.

The Federal Land Policy and Management Act of 1976 has its own right-of-way provisions, found at 43 U.S.C. §§ 1761-1771. With certain exceptions, they apply generally to land and interests in land owned by the United States and administered by the Interior Department's Bureau of Land Management, and to land within the National Forest System under the jurisdiction of the Secretary of Agriculture. 43 U.S.C. §§ 1702(e), 1761(a). Along with the enactment of these provisions, the FLPMA repealed a number of pre-existing right-of-way statutes, including 43 U.S.C. § 961, insofar as they apply to lands covered by the FLPMA. Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976). The FLPMA defines right-of-way as including "an easement, lease, permit, or license" (43 U.S.C. § 1702(f)), a definition consistent with the consolidation of provisions addressing these various forms of right-of-way. Accordingly, cases like 36 Comp. Gen. 23, apart from the fact that they continue to apply to non-FLPMA lands, would appear to remain valid under FLPMA. In any

[49]An interest in land greater than an easement is of course also compensable. For a case distinguishing between a leasehold interest (compensable) and a license (non-compensable), see Potomac Electric Power Co. v. Fugate, 180 S.E.2d 657 (Va. 1971).

event, the essence of 36 Comp. Gen. 23 is the nature of the utility's property interest and not the statute under which it was granted.

A key factor in establishing the government's liability in 36 Comp. Gen. 23 was that the easement was for a specific location. The significance of this can be illustrated by a case involving the reverse situation—relocation of power lines owned by the government. The Bonneville Power Administration had acquired by condemnation an easement for power lines on land owned by a railway company. Expansion of the railway necessitated relocation of the power lines, and the question was whether Bonneville or the railway should pay for the relocation. The government's easement was a general easement to maintain the lines, not tied in to any specific location, and unconditional acquiescence by the railway could not be established. In these circumstances, the government—analogous to the public utility in the more typical case—had to bear the expense. United States v. Oregon Electric Railway Co., 195 F. Supp. 182 (D. Or. 1961).

b. Statutory Exceptions

(1) Uniform Relocation Act

The original enactment of the Uniform Relocation Act in 1970 did not address public utilities, and the Supreme Court held that, with respect to "utility facilities" as opposed to normal business offices, they were not covered. In Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co., 464 U.S. 30 (1983), the Court held that a public utility forced to relocate telephone transmission facilities as a result of a federally funded urban renewal project was not a "displaced person" under the URA. Applying the principle that a statute should not be construed to repeal or displace the common law unless the intent to do so is expressed in clear and explicit language, the Court said:

> "Our analysis of the statute and its legislative history convinces us that in passing the Relocation Act Congress addressed the needs of residential and business tenants and owners, and did not deal with the separate problem posed by the relocation of utility service lines. We hold, therefore, that the Relocation Act did not change the long-established common law principle that a utility forced to relocate from a public right-of-way must do so at its own expense; it is not a 'displaced person' as that term is defined in the Act." Id. at 34.

See also Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980).

The 1987 amendments to the URA added a provision, 42 U.S.C. § 4622(d), to authorize limited relocation assistance to public utilities forced to relocate their facilities incident to a program or project undertaken by a displacing agency, as long as the program or project is not one whose purpose is to relocate or reconstruct the facility. The facility to be displaced may be publicly, privately, or cooperatively owned, but must be located on public property or property over which a state or local government has an easement or right-of-way, and must be operating under a franchise or similar agreement (or state statute which serves the same purpose). The authorized payment is limited to the amount of "extraordinary costs" incurred by the utility in connection with the relocation, "less any increase in the value of the new utility facility above the value of the old utility facility and less any salvage value derived from the old utility facility." 42 U.S.C. § 4622(d)(1). Extraordinary costs are nonroutine relocation expenses of the type that the owner "ordinarily does not include in its annual budget as an expense of operation." 42 U.S.C. § 4622(d)(2)(A).

There is an important difference between 42 U.S.C. § 4622(d) and the other benefit provisions of the URA: while the other provisions are cast in mandatory language, section 4622(d) is discretionary—the displacing agency "may" make the relocation payments. In preparing the uniform implementing regulations (49 C.F.R. § 24.307), the Department of Transportation was urged—probably by the utilities—to make the benefits of section 4622(d) mandatory. It expressly refused to do so, stating that "[i]t would not be appropriate to make mandatory by regulation that which was left clearly permissive by statute." 54 Fed. Reg. 8923 (March 2, 1989) (Supplementary Information statement).

The regulations direct agencies which choose to make payment under section 4622(d) to reach a prior agreement with the utility owner on the nature of the relocation work to be done, the allocation of responsibilities, and the method of determining costs and making payment. 49 C.F.R. § 24.307(c). For guidance in reaching agreement, agencies should follow the utility relocation regulations of the Federal Highway Administration, 23 C.F.R. Part 645, Subpt. A. See 49 C.F.R. App. A to § 24.307.

The conference report on the 1987 amendments emphasized that the new section 4622(d) should “not be construed to supersede 23 U.S.C. § 123 or any other Federal law.” H.R. Conf. Rep. No. 100-27, at 251 (1987), reprinted at 1987 U.S.C.C.A.N. 122, 235.

(2) 23 U.S.C. § 123

Highway construction is one of the most common causes of utility displacement. Under 23 U.S.C. § 123, originally enacted in 1958, states may be reimbursed for utility relocation expenses paid in connection with federally aided highway construction, if those payments are authorized under state law. Reimbursement is to be in the same proportion as other project costs. The availability of 23 U.S.C. § 123 to a given state depends on the extent to which that state follows or has departed from the common-law rule.

The statute is not self-executing and does not itself create an obligation to reimburse. A state’s right to reimbursement depends on project approval by the Federal Highway Administration in accordance with 23 U.S.C. § 106 and applicable regulations. Approval creates a contractual obligation. Arizona v. United States, 494 F.2d 1285 (Ct. Cl. 1974).

In determining the cost of relocation for purposes of section 123, any increase in the value of the new facility and any salvage value derived from the old facility must be deducted. 23 U.S.C. § 123(c). (As noted above, the discretionary authority of 42 U.S.C. § 4622(d) incorporates this concept.) Cost determinations under section 123 must be made on the basis of a specific project. Statewide determinations do not satisfy the statute. B-149833, January 2, 1964; B-149833-O.M., June 24, 1963; B-149833-O.M., November 9, 1962.

The purpose of reimbursement under 23 U.S.C. § 123 is to make the utility whole, not to confer a profit. Thus, where a parent corporation owned two subsidiaries, one of which earned a profit for the parent on purchases from it by the other, GAO concluded that the “intercompany profit” should not be a reimbursable item of cost under section 123. However, reimbursement would be permissible if it could adequately be shown that the sales for relocation purposes displaced a substantially equivalent amount of regular sales which would otherwise have been made. B-154937, December 16, 1964, modified by B-154937, May 25, 1965.[50]

(3) Other statutory provisions

Several other statutes scattered throughout the United States Code address utility relocation in various specific contexts, some of which are quite narrow in scope. Others may exist in addition to those noted below. These statutes, as with 23 U.S.C. § 123, were unaffected by the 1987 enactment of 42 U.S.C. § 4622(d).

One example is section 2 of the Flood Control Act of 1938, as amended, 33 U.S.C. § 701c-1. This statute authorizes the Secretary of the Army to acquire, and to reimburse states and municipalities for the acquisition of, lands, easements, and rights-of-way, expressly including "utility relocation," deemed necessary in connection with authorized flood control projects. The statute has been construed as authorizing the Army to pay utility relocation expenses wholly independent of any right-of-way acquisition. B-134242, December 24, 1957.

Another example is section 14 of the Reclamation Project Act of 1939, 43 U.S.C. § 389, which provides comparable authority to the Secretary of the Interior "in connection with the construction or operation and maintenance of any project." The measure of compensation for utility relocation is the replacement cost of the facility less an allowance for depreciation of the old facility. See B-125045-O.M., September 21, 1959.

Still another is 16 U.S.C. § 580b, enacted in 1949, under which the Forest Service may use its appropriations to correct inductive

[50]These decisions concerned the American Telephone and Telegraph Company and its subsidiaries prior to the divestiture of the 1980s. While the decisions may no longer have direct application to "Mother Bell" and her family, the underlying concepts would appear to remain nonetheless valid.

interference on Forest Service telephone lines caused by transmission lines constructed by organizations financed by Rural Electrification Administration loans. GAO had previously advised that statutory authority was generally necessary to overcome the common-law prohibition in this context. B-33911, May 5, 1943;[51] B-33911/B-62187, July 15, 1948. See also B-62187, December 3, 1946 (exception recognized where the work "was prompted by reasons of expediency wholly unconnected with the prevention or correction of inductive interference from electric power transmission lines").

Finally, whenever construction of a project administered through the International Boundary and Water Commission (United States and Mexico) necessitates the alteration or relocation of structures or other property "belonging to any municipal or private corporation, company, association, or individual," the Secretary of State may pick up the tab. 22 U.S.C. § 277e. This provision has been held sufficient to overcome the common-law prohibition. B-129757, November 29, 1956; B-5441, August 29, 1939. Conspicuously absent from the statutory listing of owners are "states." Therefore, the statute does not encompass agreements with the state of Texas comparable to the types of agreements authorized under statutes such as 33 U.S.C. § 701c-1 or 43 U.S.C. § 389. B-76531, September 13, 1948.

In sum, when considering whether a federal agency may use its appropriated funds to pay all or part of the costs of utility relocation, the first question to ask is whether the situation is covered by some specific relocation statute such as 23 U.S.C. § 123 or one of those noted directly above. If so, then the authorities and limitations of that specific statute, and any regulations under it, will govern. If not, the next thing to consider is the availability of the discretionary authority of the Uniform Relocation Act, 42 U.S.C. § 4622(d). If that authority is not available or if the displacing agency declines to

[51]This decision dealt with both revocable licenses and easements. With respect to licenses, the application of the common-law rule and the concomitant need for statutory authority are still valid. As to easements, however, the decision relied on 20 Comp. Gen. 379 (1941), which was effectively, although not explicitly, modified in this respect by 36 Comp. Gen. 23 (1956), discussed earlier in the text.

exercise its discretion in favor of the utility, the matter is governed by the common-law principles discussed.

D. Jurisdiction Over Federal Land: The Federal Enclave

1. Acquisition of Federal Jurisdiction

Almost all federally owned land is within the boundaries of one of the 50 states. This leads logically to the question: who controls what? When we talk about jurisdiction over federal land, we are talking about the federal-state relationship. The first point is that, whether the United States has acquired real property voluntarily (purchase, donation) or involuntarily (condemnation), the mere fact of federal ownership does not withdraw the land from the jurisdiction of the state in which it is located. E.g., Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 197 (1937). Acquisition of land and acquisition of federal jurisdiction over that land are two different things.

Federal jurisdiction can range from "exclusive jurisdiction" at one extreme, in which the federal government in essence displaces the state as governing authority, to "proprietorial jurisdiction" at the other extreme, in which the United States has basically the same authority as it does with respect to other nonfederal land in that state. In between, as one study has reported, federal control "can and does vary to an almost infinite number of degrees."[52] During the last half of the 19th century and first half of the 20th, most land acquired by the United States was acquired with exclusive federal jurisdiction.[53]

[52]Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part I, at 2 (1956).

[53]Id. at 8-10.

There are two ways in which the United States can acquire exclusive federal jurisdiction: consent and cession. The first method, consent, is provided in Article I, section 8, clause 17 of the Constitution, the so-called Jurisdiction Clause:

> "The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over [the District of Columbia], and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

The term "exclusive legislation" means "exclusive jurisdiction." James v. Dravo Contracting Co., 302 U.S. 134, 141 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930). Or perhaps more clearly, "exclusive jurisdiction to legislate." The term "other needful buildings" includes "whatever structures are found to be necessary in the performance of the functions of the Federal Government." Dravo, 302 U.S. at 143; Silas Mason, 302 U.S. at 203. Legislative consent to the purchase may be given before, at the time of, or after the purchase. 13 Op. Att'y Gen. 411 (1871). Consent may be in the form of a general consent statute or consent to a particular acquisition. United States v. State Tax Commission of Mississippi, 412 U.S. 363, 372 n.15 (1973). The Jurisdiction Clause has not been strictly construed, and Justice Frankfurter once commented that its "course of construction . . . cannot be said to have run smooth." Offutt Housing Co. v. County of Sarpy, 351 U.S. 253, 256 (1956).

The second method, cession, is also accomplished by an enactment of the state legislature and was recognized by the Supreme Court over a century ago in the leading case of Fort Leavenworth RR. Co. v. Lowe, 114 U.S. 525 (1885). Some years later, the Court emphasized that Clause 17 "is not the sole authority for the acquisition of jurisdiction. There is no question about the power of the United States to exercise jurisdiction secured by cession, though this is not provided for by Clause 17." Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 529 (1938). For similar statements, see Kleppe v. New Mexico, 426 U.S. 529, 542 (1976); Paul v. United States, 371 U.S. 245, 264 (1963); and United States v. Gliatta, 580 F.2d 156, 158 (5th Cir. 1978), cert. denied, 439 U.S. 1048.[54]

Apart from procedural distinctions, the differences between consent and cession are slight, and there appears to be little practical difference resulting from which method is used. At one time, cession was viewed as useful primarily in cases where Clause 17 was thought inapplicable, for example, acquisition by condemnation. See generally Fort Leavenworth RR. Co. v. Lowe, cited above. In more recent cases, however, the Supreme Court has said that “purchase” for purposes of Clause 17 includes condemnation. United States v. State Tax Commission of Mississippi, 412 U.S. at 372 n.14. The Court has also held that donation is a “purchase” for purposes of Clause 17. Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964). Thus, no practical distinction seems to flow from the method of acquisition of the land or the timing of the state’s “consent.”

The applicability or nonapplicability of Clause 17 is still relevant in determining which method must be used in some situations. For example, Clause 17 comes into play only where the land is being acquired for one of the purposes specified in Clause 17. Thus, Clause 17 would generally not apply to land acquired for a national park, and cession would therefore be the only method of acquiring federal jurisdiction. In another leading case, Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), the Supreme Court established that jurisdiction by cession is not limited to the purposes specified in Clause 17. Thus, the United States can acquire the same jurisdiction over, say, a national park by cession that it could acquire over a military installation by a Clause 17 consent.

Another area in which distinctions once thought important have become blurred is the extent to which a state may qualify its consent or cession. Even in the early days, “exclusive jurisdiction” was rarely absolute. For example, the states, with the express approval of the Supreme Court, typically reserved the power to serve civil and criminal process. This was necessary in order to avoid having

[54]There is a third method, but it is unlikely to be used with any frequency in the future. Congress can reserve federal jurisdiction over federal land within a state at the time the state is admitted to the Union. Fort Leavenworth RR. Co. v. Lowe, 114 U.S. 525, 526 (1885); State v. Galvan-Cardenas, 799 P.2d 19, 21 (Ariz. Ct. App. 1990).

federal land become a sanctuary for fugitives, and does not diminish the "exclusiveness." Fort Leavenworth RR. Co., 114 U.S. at 533. See also Cornman v. Dawson, 295 F. Supp. 654, 657 n.5 (D. Md. 1969), aff'd sub nom. Evans v. Cornman, 398 U.S. 419 (1970); 39 Op. Att'y Gen. 155 (1938); 38 Op. Att'y Gen. 341, 347-348 (1935).[55] However, for several decades, it was thought that a state's power to qualify its consent was broader under a cession than under a Clause 17 consent. By the exercise of simple logic, the Supreme Court laid this thought to rest in still another leading case, James v. Dravo Contracting Co., 302 U.S. 134 (1937). There was no question that a state could refuse consent at the time of acquisition, and then later cede jurisdiction subject to qualifications. Why then, reasoned the Court, couldn't the state consent to the acquisition with the same qualifications in the first place? Id. at 147-149.

It has become settled since Dravo that a state can qualify either a Clause 17 consent or a cession, as long as the qualifications are not inconsistent with federal law or federal use. The theory is clearly stated in Collins v. Yosemite Park & Curry Co., 304 U.S. at 528:

> "The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect." (Footnotes omitted.)

Thus, acquisition of federal jurisdiction is not an "all or nothing" proposition. It has become commonplace to define federal jurisdiction in terms of four categories:

> "[T]here are four general kinds of federal jurisdiction over federal lands: exclusive legislative jurisdiction, concurrent legislative jurisdiction, partial legislative jurisdiction and proprietorial legislative jurisdiction." State ex rel. Cox v. Hibbard, 570 P.2d 1190, 1192 (Or. Ct. App. 1977).

[55]Examples of the operation of this principle at the state level include State v. Lane, 771 P.2d 1150 (Wash. 1989), and People v. Dowdell, 440 N.Y.S.2d 528 (Onondaga Cty. Ct. 1981).

See also Cornman v. Dawson, 295 F. Supp. at 656 n.4. The terms "concurrent" and "partial" in this context are self-explanatory and mean exactly what they imply.[56]

To summarize what we have said so far:

- The United States can acquire exclusive federal jurisdiction over land either by consent of the state legislature under the Jurisdiction Clause, or by cession from the state. Both methods get you essentially to the same place.
- Whichever method is used, the state may retain partial or concurrent jurisdiction as long as the powers retained are not inconsistent with federal law or use.

As noted earlier in this chapter, the state consent we have been talking about relates to jurisdiction rather than the acquisition itself. For many years prior to 1940, there was in addition a statutory requirement for consent of the state legislature when land was acquired by the United States for certain purposes. This provision was eliminated in 1940 and replaced by what is now the last (unnumbered) paragraph of 40 U.S.C. § 255, which says several important things:

- The obtaining of exclusive jurisdiction is not required.
- If the United States obtains exclusive or partial jurisdiction by consent or cession, there must be a formal acceptance by the United States, either by filing a notice of acceptance with the state governor or as otherwise provided under state law.
- If the United States has not formally accepted jurisdiction as prescribed, it is "conclusively presumed" that the jurisdiction does not exist.

Although the statute mentions only exclusive and partial jurisdiction, it applies to concurrent jurisdiction as well. Adams v. United States, 319 U.S. 312 (1943). As Adams also established, the statute means exactly what it says—formal acceptance of federal jurisdiction as prescribed in 40 U.S.C. § 255 is a legal prerequisite to the exercise of that jurisdiction. See also Hankins v. Delo, 977 F.2d

[56] Jurisdiction Over Federal Areas Within the States, supra note 52, at 14.

396 (8th Cir. 1992); DeKalb County v. Henry C. Beck Co., 382 F.2d 992 (5th Cir. 1967).

A state may not unilaterally revoke its consent once it has been given and accepted. North Dakota v. United States, 460 U.S. 300, 313 n.16 (1983), citing United States v. Unzeuta, 281 U.S. 138, 142-143 (1930).

Based on the concepts discussed above, a working definition of "federal enclave" may be framed as follows:

> A "federal enclave" is an area of land owned by the United States, with respect to which the United States has obtained exclusive, partial, or concurrent jurisdiction from the state in which the land is located, either by consent under the Jurisdiction Clause or by cession.[57]

Regardless of the existence or type of federal jurisdiction, some state law may apply in a federal enclave even without either a specific reservation or a federal statute making it applicable. The Supreme Court has recognized that every area within the United States should have a developed legal system. Thus, state law protecting private rights which is in existence at the time of the consent or cession remains applicable in the enclave as long as it does not interfere with the federal use and is not inconsistent with federal law, unless and until Congress acts to make it inapplicable. This principle is called "assimilation." The opposite is true for state laws enacted after the consent or cession: they do not apply in the enclave unless Congress acts to make them applicable. James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).[58]

[57]Some judicial definitions limit the term to exclusive jurisdiction. E.g., Cooper v. General Dynamics, 378 F. Supp. 1258, 1261 (N.D. Tex. 1974), rev'd on other grounds, 533 F.2d 163 (5th Cir. 1976), cert. denied, 433 U.S. 908 (1977); Thiele v. City of Chicago, 145 N.E.2d 637, 638 (Ill. 1957). However, the Supreme Court has used the term in the broader sense. E.g., North Dakota v. United States, 495 U.S. 423 (1990). In addition, the United States may obtain federal jurisdiction over leased property as well as property it owns. Jurisdiction Over Federal Areas Within the States, supra note 52, at 2.

[58]This assimilated state law is sometimes referred to as "federalized state law." E.g., Board of Supervisors of Fairfax County v. United States, 408 F. Supp. 556, 563 (E.D. Va. 1976), appeal dismissed mem., 551 F.2d 305 (4th Cir. 1977). The concept has no application to a concurrent jurisdiction enclave. Sylvane v. Whelan, 506 F. Supp. 1355, 1361 (E.D. N.Y. 1981).

One example, involved the applicability of the Florida right-to-work law on two exclusive jurisdiction enclaves in Florida, Patrick Air Force Base and Cape Canaveral Air Force Station. Finding that the Florida law was enacted before the transfer of sovereignty for Cape Canaveral AFB but after the transfer of sovereignty for Patrick AFB, the district court held the Florida law applicable on the former but not the latter. On appeal, the Court of Appeals for the Fifth Circuit affirmed as to Patrick but reversed as to Canaveral, finding that the Florida law was in conflict with the National Labor Relations Act. Lord v. Local Union No. 2088, IBEW, 481 F. Supp. 419 (M.D. Fla. 1979), aff'd in part, rev'd in part, 646 F.2d 1057 (5th Cir. 1981), cert. denied, 458 U.S. 1106 (1982). Another example is Snow v. Bechtel Construction Inc., 647 F. Supp. 1514, 1521 (C.D. Cal. 1986), finding that an employee of a government contractor working on an exclusive jurisdiction enclave did not have a cause of action for wrongful termination because the state wrongful termination law "was enacted well after the land became a federal enclave." See also Pacific Coast Dairy, Inc. v. Department of Agriculture, 318 U.S. 285, 294 (1943); Macomber v. Rose, 401 F.2d 545 (9th Cir. 1968); Economic Development and Industrial Corp. of Boston v. United States, 546 F. Supp. 1204 (D. Mass. 1982), rev'd on other grounds, 720 F.2d 1 (1st Cir. 1983); Vincent v. General Dynamics Corp., 427 F. Supp. 786, 794-795 (N.D. Tex. 1977).

Sometimes the United States does not acquire all land within the exterior boundaries of a project because it is not needed. When this happens, there may be privately owned tracts within and surrounded by federal land, in what may be termed a "checkerboard" pattern. By analogy from cases dealing with federal land, the courts have held that the United States can acquire by cession the same types of exclusive, partial, or concurrent jurisdiction over these privately owned tracts. E.g., Macomber, 401 F.2d 545; Petersen v. United States, 191 F.2d 154 (9th Cir. 1951), cert. denied, 342 U.S. 885; United States v. 319.88 Acres, 498 F. Supp. 763 (D. Nev. 1980).

Today, only a small portion of federal land is held in enclave status. According to one authority,[59] approximately 36.5 million acres are

[59]George C. Coggins and Charles F. Wilkinson, Federal Public Land and Resources Law 146 (1981).

held under partial or concurrent jurisdiction, and another 6 million under exclusive jurisdiction. While these figures may seem large, they represent only 5 percent and less than 1 percent, respectively, of federal land. Exclusive jurisdiction enclaves tend to be military installations or national parks, although not all military installations or national parks are enclaves.

As a general proposition, if the United States disposes of enclave property, legislative jurisdiction reverts to the state (also called "re-vesting" or "retrocession"), although the situation can become complicated by the nature of the particular transaction. See S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946) (retention by United States of legal title as security interest does not prevent reverter); Humble Pipe Line Co. v. Wagoner, 376 U.S. 369 (1964) (lease by United States to commercial interests not sufficient to produce reverter); United States v. Goings, 504 F.2d 809 (8th Cir. 1974) (retention by United States of right of emergency use does not prevent reverter). The military departments have specific statutory authority to "retrocede" federal legislative jurisdiction, in whole or in part, to the state, if considered desirable. 10 U.S.C. § 2683.

One of the conditions a state may attach to its consent or cession is that legislative jurisdiction (title too, if the land was donated) revert to the state if the property ceases to be used for the purpose for which jurisdiction was ceded. Illustrative cases are United States v. Johnson, 994 F.2d 980 (2d Cir. 1993), cert. denied, 510 U.S. 959; and Economic Development and Industrial Corp. v. United States, 13 Cl. Ct. 590 (1987). Absent such reservation or condition, federal jurisdiction is not diminished by the fact that a portion of the land is put to some use different from that for which it was acquired. Benson v. United States, 146 U.S. 325, 331 (1892); United States v. Fallbrook Public Utility District, 108 F. Supp. 72, 85 (S.D. Cal. 1952).

Totally apart from the question of reservation of state powers, it is fair to say that exclusive federal jurisdiction isn't nearly as exclusive as it used to be. Congress has enacted a number of statutes, which may be characterized as "partial retrocessions," which have the effect of returning portions of jurisdiction to the states or incorporating state law in particular subject areas. Two of the more important ones, the Buck Act and the Assimilative Crimes Act, will be noted later in this discussion. Some others are:

(a) In cases of wrongful death on federal enclaves, the right of action provided by state law exists as if the enclave were under state jurisdiction. 16 U.S.C. § 457. This includes changes in applicable state law as they may occur from time to time. E.g., Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), cert. denied, 469 U.S. 1062; Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981). Of course, this statute does not affect the operation of the Federal Tort Claims Act in cases where it is applicable. E.g., Morgan v. United States, 709 F.2d 580, 582 (9th Cir. 1983).

(b) State unemployment compensation laws apply on federal enclaves. 26 U.S.C. § 3305(d).

(c) State workers' compensation laws apply on federal enclaves. 40 U.S.C. § 290. The statute merely makes state law applicable to private employers on federal land; it does not create any federal liability. Peak v. Small Business Administration, 660 F.2d 375, 376 n.1 (8th Cir. 1981). The constitutionality of 40 U.S.C. § 290 was upheld in Wallach v. Lieberman, 366 F.2d 254 (2d Cir. 1966).[60] Section 290 applies equally to federal facilities that are not enclaves. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 182 n.4 (1988).

2. Specific Areas of Concern

a. Taxation

As a general proposition, a state cannot tax private property in a federal enclave unless it has reserved the power to do so at the time of consent or cession. Humble Pipe Line v. Wagoner, 376 U.S. 369 (1964); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938); James v. Dravo Contracting Co., 302 U.S. 134 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); Fort Leavenworth RR. Co. v. Lowe, 114 U.S. 525 (1885).

Congress has modified this rule somewhat by statute. Under the Buck Act of 1940, 4 U.S.C. §§ 105-110, states may levy sales, use, and income taxes within federal enclaves. The Buck Act has generated its share of litigation. One type of question that has arisen is whether

[60]It would appear that the question wasn't especially close, as the district judge, referred to the case as "worthless litigation." Wallach v. Lieberman, 219 F. Supp. 247, 249 (S.D. N.Y. 1963).

various forms of state and local taxation are sales, use, or income taxes for purposes of the Buck Act. E.g., United States v. State Tax Commission of Mississippi, 412 U.S. 363, 378-379 (1973); Howard v. Commissioners of The Sinking Fund, 344 U.S. 624 (1953). See also 30 Comp. Gen. 28 (1950) (permit fee charged by city for construction on exclusive jurisdiction enclave not a "tax" within scope of state's reservation of jurisdiction in deed of cession). One court has held a local occupation tax to be an "income tax" for Buck Act purposes. United States v. Lewisburg Area School District, 398 F. Supp. 948 (M.D. Pa. 1975).

The Buck Act permits sales, use, and income taxes, but not property taxes. Thus, in B-159835, February 2, 1976, the Comptroller General advised that a county in Utah had no power to impose an ad valorem tax on private property within the United States Defense Depot, a federal enclave in Ogden, Utah, where there had been no reservation of taxing power at the time of cession.

Another statute, 4 U.S.C. § 104, authorizes the imposition of state motor fuel taxes on fuel sold on "United States military or other reservations" if the fuel is not for the exclusive use of the United States. This includes national parks. 38 Op. Att'y Gen. 522 (1936). The purpose of this statute was to enhance highway improvement by increasing state revenues which could be used as matching funds under the federal-aid highway program. Minnesota v. Keeley, 126 F.2d 863 (8th Cir. 1942); Sanders v. Oklahoma Tax Comm'n, 169 P.2d 748 (Okla. 1946).

Still another statute, 10 U.S.C. § 2667(e), permits state and local taxation of the interests of lessees of property leased by a military department under the authority of 10 U.S.C. § 2667.

The preceding paragraphs address the power of a state to reach into a federal enclave to tax private property, private instrumentalities, or the income of federal employees. Neither the concept of reservation of powers nor the Buck Act affects the immunity of the United States from state and local taxation, covered in Chapter 4. In fact, the Buck Act expressly preserves the immunity of the United States. 4 U.S.C. § 107. A case applying section 107 is United States v. Tax Comm'n, 421 U.S. 599 (1975).

b. Criminal Law

The punishment of crimes committed on federal enclaves has been a subject of congressional attention since the First Congress.[61] At the present time, the criminal law structure for federal enclaves consists of several specific statutes and one general one.

Congress has enacted a number of criminal statutes, found in Title 18 of the United States Code, dealing with criminal offenses on federal enclaves. These are generally the "major" crimes such as murder, rape, arson, etc. About a dozen are listed in United States v. Sharpnack, 355 U.S. 286, 289 n.5 (1958). The statutes use the phrase "special maritime and territorial jurisdiction of the United States," which is defined in 18 U.S.C. § 7 as including federal enclaves. These specific statutes naturally take precedence over state law.

Offenses not covered by one of these specific statutes are covered by the Assimilative Crimes Act, 18 U.S.C. § 13, under which offenses committed on federal enclaves which are not otherwise provided for by Congress are punishable as federal crimes if and to the extent that they are punishable by the laws of the state in which the enclave is situated.

The state law applicable under the Assimilative Crimes Act is the law in effect at the time of the offense, which includes laws enacted after consent or cession. The constitutionality of the Assimilative Crimes Act was upheld in the Sharpnack case, cited above.

A defendant accused of a crime on a federal enclave may be tried before a magistrate. There is no requirement that trial be before an Article III court. United States v. Jenkins, 734 F.2d 1322 (9th Cir. 1983), cert. denied, 469 U.S. 1217 (1985).

Indian reservations are not federal enclaves. However, under 18 U.S.C. § 1152, the federal enclave criminal statutes apply to "Indian country" except as otherwise provided by law and except for offenses committed by one Indian against another Indian. The

[61] As a bit of historical trivia, murder on federal enclaves was made a federal crime as early as 1790 by the Act of April 30, 1790, Ch. IX, §§ 3-4, 1 Stat. 112, 113. Punishment was death, and if that wasn't enough, the court could order that the body of the offender, presumably already executed, "be delivered to a surgeon for dissection." Sort of "death plus."

historical development of this statute is discussed in United States v. Cowboy, 694 F.2d 1228 (10th Cir. 1982).

c. State Regulation

Another area of potential conflict is the extent to which a state can extend its regulatory arm into a federal enclave. Older cases tend to involve economic regulation such as licensing laws, permit requirements, price-fixing laws, etc. Many of the more recent cases involve environmental regulation. Depending on the interplay of certain key rules, the state regulatory action may be invalid on all federal property, non-enclave as well as enclave, valid on both, or valid on some but not all.

State regulatory action will be invalid across the board if it violates the Supremacy Clause of the Constitution (Art. VI, clause 2), which provides that laws of the United States which are within the constitutional power of the federal government are the "supreme law of the land" and prevail over inconsistent state laws. State law can violate the Supremacy Clause by directly regulating the federal government, discriminating against it or against those with whom it does business, or conflicting with valid enactments of Congress. North Dakota v. United States, 495 U.S. 423, 434 (1990). If a given action is found to violate the Supremacy Clause, it is irrelevant whether the federal land or installation in question has enclave status.

An illustration is Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956). The Air Force entered into a contract for construction work on a base which was not a federal enclave. The contractor was charged and convicted in state court for failure to obtain a license under state law. The Supreme Court reversed the conviction, finding the state licensing law inconsistent with the procuring agency's duty under federal procurement law to determine the responsibility of bidders. Similarly, in Paul v. United States, 371 U.S. 245 (1963), the Court found that California price control regulations on milk conflicted with federal procurement policy in that "the federal procurement policy demands competition [while] the California policy . . . effectively eliminates competition." Id. at 253. In neither case was the status of the particular federal installations a relevant factor.

Two GAO decisions involved contracts for mortuary services at Dover Air Force Base, Delaware. In both cases, a disappointed bidder protested that the firm receiving the award, the low bidder, did not have a Delaware mortuary license. Based primarily on Leslie Miller, GAO upheld the contract awards in both cases. B-161723, August 1, 1967; B-159723, September 28, 1966. Both decisions note that Dover was an exclusive jurisdiction enclave, but this factor was not crucial to the result.

The Supreme Court distinguishes between direct and indirect regulation for purposes of Supremacy Clause analysis. As the plain meaning of the term suggests, "direct regulation" involves attempts to regulate federal entities themselves. "Indirect regulation" is the regulation of private parties (who may be government contractors or suppliers) which has an incidental effect on the government by, for example, causing it to pay higher prices. North Dakota v. United States, 495 U.S. 423, 434-435 (1990).[62] Like direct regulation, indirect regulation must be neutral (non-discriminatory) in order to survive the Supremacy Clause. North Dakota, 495 U.S. at 435. From this point on, the analysis differs. States can directly regulate federal installations and activities only pursuant to clear and unambiguous congressional (statutory) authorization. Goodyear Atomic Corp. v. Miller 486 U.S. 174, 180 (1988); EPA v. State Water Resources Control Board, 426 U.S. 200, 211 (1976); Hancock v. Train, 426 U.S. 167, 179 (1976). The validity of indirect regulation is a question of congressional pre-emption. North Dakota, 495 U.S. at 435; Goodyear Atomic Corp., 486 U.S. at 180 n.1. The pre-emption rules are summarized in English v. General Electric Co., 496 U.S. 72, 78-79 (1990). The mere existence of federal law in a given field does not automatically pre-empt state law in that field. There must be a conflict or a clear indication of congressional intent to pre-empt. Id.; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 593 (1987).[63]

[62]Other cases recognizing the distinction include Hancock v. Train, 426 U.S. 167, 179-180 (1976); Mayo v. United States, 319 U.S. 441, 447 (1943); Penn Dairies, Inc. v. Pennsylvania Milk Control Commission, 318 U.S. 261, 270 (1943).

[63]The direct-indirect distinction, firmly imbedded though it may be, is easier to state than it is to apply. Compare, for example, the plurality and dissenting opinions in North Dakota to see how two groups of four United States Supreme Court justices each can read the same cases very differently.

Once you get by the Supremacy Clause hurdle—that is, once it is established that the state law or regulation does not conflict with valid federal law and does not attempt to impermissibly tax or regulate the federal government—the jurisdictional status of the federal property becomes relevant.[64] The state law or regulation will then apply to non-enclave property (there is no longer a reason why it shouldn't), and may or may not apply to enclaves, depending on factors previously discussed such as the types of jurisdiction the state may have reserved at the time of consent or cession and whether the law was in existence when the property achieved enclave status.

For example, in Pacific Coast Dairy, Inc. v. California Department of Agriculture, 318 U.S. 285 (1943), the Supreme Court held that a California statute requiring the licensing of milk distributors and establishing uniform prices for the sale of milk did not apply to sales on a federal enclave because the statute was enacted after the transfer of sovereignty. By the time the Court again had occasion to consider the California milk laws in Paul v. United States, cited above, the intervening enactment of the Armed Services Procurement Act of 1947 and the promulgation of implementing regulations brought the state law into direct conflict, with the result that Paul was decided on the basis of the Supremacy Clause rather than the enclave status of the military installations.

The Supremacy Clause resolved purchases to be made from appropriated funds. However, some of the milk in Paul was to be purchased with nonappropriated funds (military clubs and post exchanges). Since the federal procurement statutes and regulations did not apply to nonappropriated funds, there was no conflict with respect to these purchases. Accordingly, the applicability of the state law to nonappropriated fund purchases on exclusive jurisdiction enclaves depended on whether the state law was in effect when the United States acquired jurisdiction, a result "on all fours" with Pacific Coast. 371 U.S. at 268-269.

[64]Some courts reverse the analytical sequence and look first at the enclave issue and then invoke the Supremacy Clause if necessary. Either approach should get you to the same place.

GAO has considered problems in this area on several occasions. The questions usually arise incident to the award of federal procurement contracts. In 42 Comp. Gen. 704 (1963), the question was whether a contract for furnishing dairy products on a federal enclave could be awarded to the low bidder who had not complied with certain aspects of the state "fair trade" law. GAO found that the state law had been enacted after the transfer of jurisdiction. Therefore, based largely on the Supreme Court's decisions in Paul and Pacific Coast, GAO found the contract award to be proper. Similar cases are 27 Comp. Gen. 782 (1948) and B-151686, July 2, 1965.

If none of these approaches applies—that is, you are dealing with an exclusive jurisdiction enclave and state law enacted after the acquisition of federal jurisdiction—the state law can apply only pursuant to "specific congressional action." Paul, 371 U.S. at 263; Black Hills Power and Light Co. v. Heartland Consumers Power District, 808 F.2d 665, 668 (8th Cir. 1987), cert. denied, 484 U.S. 818. For an example where state law did not apply, compare Miller v. Wackenhut, 808 F. Supp. 697 (W.D. Mo. 1992).

Precisely how specific the congressional authority must be is somewhat unsettled. To rephrase the question: Is a statute which is sufficiently specific to survive a Supremacy Clause challenge also sufficiently specific to permit the application of state law on an enclave or must it explicitly address enclaves? Offutt v. Sarpy, 351 U.S. 253, 260 (1956), is capable of being read to suggest that it does not have to explicitly mention enclaves. But again, compare Black Hills, 808 F.2d. at 673; West River Electric Ass'n v. Black Hills Power & Light, 918 F.2d. 713, 717-20 (8th Cir. 1990); Tacoma Dept. of Pub. Util. v. United States, 28 Fed. Cl. 637, 646 (1993), aff'd 31 F.3d 1130 (Fed. Cir. 1994).

For an example of this plays out in GAO case law, see 64 Comp. Gen. 813 (1985). This was a bid protest in which a statute required federal agencies to comply with local requirements on the control and abatement of solid waste "in the same manner and to the same extent as any person subject to such requirements." Id. at 815. That language, the Comptroller General held, "expressly requires federal agencies to obtain waste disposal services from local governments" when such is required of others. Id. In this case, two military facilities were directed to cancel their competitive solicitations in favor of sole source contracts with local governments and their franchisees. A competitive procurement by another base was allowed to stand because the enclave was outside of the local government's jurisdiction and others so situated were not required to contract with the local authorities. Id. at 816. GAO's conclusions in this case were later tested in federal court and upheld. Parola v. Weinberger, 848 F.2d. 956 (9th Cir. 1988). See also Solano Garbage v. Cheney, 779 F. Supp. 477 (E.D. Cal. 1991); 72 Comp. Gen. 225, 228 (1993).

Another way state regulatory laws may apply on federal enclaves is pursuant to congressional sanction. The legislative authorization must be "clear and unambiguous." EPA v. State Water Resources Control Board, 426 U.S. 200, 211 (1976). An example is the Solid Waste Disposal Act, which directs federal agencies to comply with state and local requirements regarding the control and abatement of solid waste. 42 U.S.C. § 6961. Under this law, it has been held that federal installations must comply with local law granting an exclusive garbage collection franchise, and thus cannot solicit competitive bids. 64 Comp. Gen. 813 (1985); Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988). (While both of these cases involved federal enclaves, the result would apply equally to non-enclave property.) In contrast, no comparable federal legislation was applicable in Black Hills Power and Light Co. v. Weinberger, 808 F.2d 665 (8th Cir. 1987), cert. denied, 484 U.S. 818, holding that an exclusive jurisdiction military installation in South Dakota was not required to procure its electrical service from a utility holding an exclusive franchise under state law.

A common battleground for these principles is the area of state liquor control. In United States v. South Carolina, 578 F. Supp. 549 (D. S.C. 1983), based on an essentially straightforward application of Paul and Leslie Miller, the court enjoined the state from implementing a state law requiring federal military installations to purchase alcoholic beverages from wholesalers licensed by the state. Although the installations in question were exclusive jurisdiction enclaves (578 F. Supp. at 550), the result presumably would have been the same if they were not. In North Dakota v. United States, 495 U.S. 423 (1990), the Supreme Court upheld a state requirement that out-of-state liquor vendors affix labels to each item to be delivered to a federal enclave in the state. The Court distinguished this type of indirect regulation, which was permissible even though it incidentally raised costs to the military, from the types of direct regulation encountered in cases like Paul and Leslie Miller.

In cases involving direct regulation of a federal activity where there is no conflict with a specific piece of federal legislation, the result turns on a balancing of the state's interest in applying its regulation against the federal government's interest in being free from it. Examples are United States v. Town of Windsor, 765 F.2d 16 (2d Cir. 1985), and B-199838, March 24, 1986. Both cases found local building permit requirements inapplicable to government contractors doing construction on non-enclave property.

3. Proprietorial Jurisdiction

A central theme of our discussion is that a federal enclave is essentially a consensual arrangement. Whether federal jurisdiction is obtained by Clause 17 consent or by cession, a federal enclave cannot come into being without the consent of the state and acceptance by the United States. Thus, enclave status can be neither coerced from the state nor forced upon the United States.

As we have seen, federal enclaves comprise less than ten percent of all federally owned land. For the remainder—land over which the United States has not obtained exclusive, partial, or concurrent jurisdiction by consent or cession—federal jurisdiction is said to be "proprietorial." This term originated from language in some of the cases to the effect that, absent consent or cession, the United States has "only the rights of an ordinary proprietor." E.g., Fort Leavenworth v. Lowe, 114 U.S. 525, 527 (1885).

While the term "proprietorial" implies that the United States is in the same position as any private owner, this is not the case. The United States may exercise authority over federal land, enclave or non-enclave, under Article IV, section 3, clause 2 of the Constitution, the Property Clause:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

The full significance of the Property Clause as an alternative to the Jurisdiction Clause does not appear to have been realized until the landmark case of Kleppe v. New Mexico, 426 U.S. 529 (1976). A New

Mexico rancher had obtained a permit from the Bureau of Land Management under the Taylor Grazing Act to graze cattle on certain "BLM land" in New Mexico. The rancher complained to a state agency that wild burros on the BLM land were interfering with his cattle. The state agency rounded up 19 of the wild burros and sold them at auction. The BLM demanded that the state recover and return the burros, claiming that the state's action violated the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340. New Mexico brought suit, alleging that the statute was unconstitutional.

The Supreme Court held that the wild burro statute was a valid exercise of congressional power under the Property Clause, and that it overrode any inconsistent state law. Congress, said the Court, has the power of a legislature as well as a proprietor over federal land. 426 U.S. at 540. That power is "without limitations" (id. at 539) and "complete" (id. at 540). The Court then squarely addressed the relationship of federal enclaves to the Property Clause:

"Congress may acquire derivative legislative power from a State pursuant to Art. I, § 8, cl. 17, of the Constitution by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land. . . . In either case, the legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power . . . to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority. . . .

"But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." Id. at 542-543.

The Supreme Court's opinion was unanimous. Concurrence of the burros may be presumed.[65]

[65]It was subsequently established that damage to private land caused by the wild horses and burros does not amount to a compensable "taking." Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Both the courts and the Comptroller General have recognized and reflected the significance of the Kleppe decision. One illustration is the selection of nuclear waste repository sites. GAO considered the issue in the late 1970s and concluded that a state could not block the establishment of a nuclear waste repository merely by withholding or qualifying consent under the Jurisdiction Clause. Exclusive federal jurisdiction is not a necessary prerequisite to establishing the repository, and Congress has adequate power under the Property Clause. Accordingly, an agreement by the Secretary of Energy purporting to give a state "veto power" over site selection would be unenforceable. B-192999, May 22, 1979. See also B-164105, June 19, 1978, reaching the same conclusion based on the Department of Energy's organic legislation. Several years later, Congress enacted amendments to the Nuclear Waste Policy Act designating a site in Nevada for possible development as a repository. The state went to court, and the Ninth Circuit held that the legislation was within congressional power under the Property Clause, and that there was no requirement that the site be located on a federal enclave (in which event, of course, state consent would become necessary). Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 499 U.S. 906 (1991).

Some other examples follow:

- An individual was fined for hunting ducks in a national park in Minnesota, in violation of National Park Service regulations prohibiting hunting or the possession of loaded firearms in national parks. The regulations had been issued pursuant to a statutory delegation. Even if the state had not ceded jurisdiction to the United States, the regulation was nevertheless valid under the Property Clause and took precedence over conflicting state law. This was equally true with respect to nonfederal waters within the park. United States v. Brown, 552 F.2d 817 (8th Cir. 1977), cert. denied, 431 U.S. 949.
- National Park Service could, under a statutory delegation, issue regulation requiring use of seat belts in national parks. Defense Department, although it does not have statutory authority to regulate federal land comparable to that of the Park Service, could also require seat belt use by regulation, at least on land under exclusive federal jurisdiction. B-216218, November 30, 1984.
- Regulations for traffic control on Postal Service property are valid under the Property Clause, regardless of presence or absence of

enclave jurisdiction. United States v. Gliatta, 580 F.2d 156, 160 (5th Cir. 1978), cert. denied, 439 U.S. 1048.

- Federal legislation which authorizes Secretary of Agriculture to regulate grazing in the national forests overrides state open range law. Bilderback v. United States, 558 F. Supp. 903 (D. Ore. 1982).

Notwithstanding the very broad language it used in the Kleppe decision, the Supreme Court also noted in that case that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved." 426 U.S. at 539. It thus seems likely that litigation in this area will continue and that the law will continue to evolve.[66]

E. Leasing

If the government needs a building, there are several ways it can go about getting it. It can purchase an existing structure, making payment directly from appropriations available for that purpose; it can have the building constructed to order, again making payment directly from appropriations available for that purpose; it can lease an existing building; or it can use some form of lease-purchase or lease-construction arrangement. This section will address the leasing options.

1. Some General Principles

a. Acquisition

A lease in the real property context may be defined as "[a]ny agreement which gives rise to [a] relationship of landlord and tenant." Black's Law Dictionary 889 (6th ed. 1990); B-96826-O.M., February 8, 1967. General Services Administration regulations define the term to mean "a conveyance to the Government of the right of exclusive possession of real property for a definite period of time by a landlord." 48 C.F.R. § 570.102.

[66]As a final note, the federal government may, through legislation under the "necessary and proper" clause of the Constitution (Art. I, § 8, cl. 18), exercise specific types of jurisdiction over property which it merely leases. E.g., United States v. Burton, 888 F. 2d 682 (10th Cir. 1989) (upholding General Services Administration's authority to enforce anti-handbill regulation in leased building).

It is generally recognized that, except for depressed real estate markets, leasing is less cost-effective than ownership. See generally Federal Office Space: Increased Ownership Would Result in Significant Savings, GAO/GGD-90-11 (December 1989).[67] Nevertheless, there are situations in which leasing is clearly the desirable option, such as where the government needs the space only for a short term or where it needs only a small amount of space. Id. at 14-15. Too often, however, the decision whether to lease or buy is driven by budgetary considerations rather than the nature of the government's need. The problem is that budget authority for purchase or direct construction must be provided "up front," whereas budget authority for leasing is provided year by year. Not surprisingly, large chunks of money for purchase or construction have traditionally been prime targets for budget-cutting by a Congress under constant pressure to reduce spending. Eliminating tens of millions of dollars to construct or acquire a building produces an immediately visible result, albeit only a short-term one, without angering any program's constituents. Congress has struggled with this problem for many years. In the Public Buildings Amendments of 1972, Congress recognized that direct construction was "the most efficient and economical means of meeting Government building needs," but essentially conceded "the futility of seeking a billion dollars for direct Federal construction . . . in competition with the present spending priorities." H.R. Rep. No. 92-989, (1972), reprinted in 1972 U.S.C.C.A.N. 2370, 2373. In any event and whatever the reasons, nearly half (48 percent) the space controlled by the General Services Administration as of 1994 was leased, costing over $2 billion a year. Federal Office Space: More Businesslike Leasing Approach Could Reduce Costs and Improve Performance, GAO/GGD-95-48 (February 1995), at 10.

As with the acquisition of fee title, the government can acquire a lease voluntarily, or it can acquire it involuntarily. Voluntary acquisition is the preferred method. As we will discuss later in this section, most leasing for the federal government is done by, or under delegation from, the General Services Administration. GSA's stated policy in the Federal Property Management Regulations is to lease privately owned space "only when needs cannot be satisfactorily

[67] United States v. Bedford Assoc., 657 F.2d 1300, 1309 (2d Cir. 1981), cert. denied, 456 U.S. 914 (1982).

met in Government-controlled space" and leasing is more advantageous than construction or alteration. 41 C.F.R. § 101-18.100(a). As noted above, GSA will also lease when it cannot obtain sufficient budget authority to do anything else.

A lease of real property is subject to the Competition in Contracting Act's requirement for full and open competition. B-225954, March 30, 1987. The GSA regulations provide as follows:

> "Acquisition of space by lease will be by negotiation except where the sealed bid procedure is required by 41 U.S.C. 253(a). Except as otherwise provided in 41 U.S.C. 253, full and open competition will be obtained among suitable available locations meeting minimum Government requirements." 41 C.F.R. § 101-18.100(d).

The regulations further provide that acquisition by lease "will be on the basis most favorable to the Government . . . and only at charges consistent with prevailing scales for comparable facilities in the community." 41 C.F.R. § 101-18.100(c). Specific contracting procedures are found in the General Services Administration Acquisition Regulations, 48 C.F.R. Part 570.

The evaluation factors in a lease invitation should be as clear and exact as possible, although a high level of precision is not required. "It is sufficient, in [GAO's] opinion, to prescribe general guidelines of acceptability which necessarily must be applied as equitably as possible to the locations of the office spaces tendered." 43 Comp. Gen. 663, 667 (1964).

While the term "government-controlled space" as used in the GSA regulations includes leased space, the regulations do not give an incumbent lessor an exclusive right to negotiate extensions of the lease. See B-251337.2, April 23, 1993; 48 Comp. Gen. 722, 724-725 (1969). Indeed, there are situations in which the government is not even required to include the incumbent lessor in the solicitation for the new lease. B-251288, March 18, 1993.[68]

[68]As a general proposition, however, unless a market survey shows that the incumbent lessor will be unable to meet the government's needs for the new lease, full and open competition requires that the incumbent be included. E.g., B-247910.3, June 8, 1993; B-225954, March 30, 1987. See also 48 Comp. Gen. at 725.

While a lease is the conveyance of a possessory interest in real property, it is also a contract. E.g., Keydata Corp. v. United States, 504 F.2d 1115, 1123 (Ct. Cl. 1974). Therefore, it does not come into existence unless and until both parties execute the required formalities, i.e., sign the lease contract. B-228279/B-228280, January 15, 1988.

Unless required by statute, it is not essential that the lease be recorded in the jurisdiction in which the property is located. A-19681, September 28, 1927. Many states, however, have statutes which require the recording of leases for more than a stated term. The precise effect of these laws is subject to variation from state to state, but they are generally regarded as protecting the rights of the tenant by providing legal notice of the tenancy to subsequent purchasers or lessees. Id.; 26 Comp. Gen. 331 (1946).[69] In determining whether a lease exceeds the minimum term specified in a recording statute, the period covered by renewal options should be added to the basic lease term. 26 Comp. Gen. 335 (1946). While the government's policy has been that the cost of recording a lease should be borne by the lessor, recording fees may be charged to operating appropriations if there is a legitimate reason for the government to pay. 26 Comp. Gen. 331.

If the government is unable to meet its leasing needs voluntarily, it can fall back on the power of eminent domain. It has long been settled that the takings clause of the Fifth Amendment applies to "temporary takings" as well as the taking of full title. E.g., Phelps v. United States, 274 U.S. 341 (1927). See also 22 Comp. Gen. 1112, 1114 (1943), regarding it as "settled law that the use of property can be taken as well as the title to property."

Involuntary acquisition of a leasehold can take various forms. If there is already an existing lease, the government can simply condemn the entire leasehold. E.g., Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973); United States v. Petty Motor Co., 327 U.S. 372 (1946). If the government needs the property for a shorter term than that of an existing lease, it can

[69]This is not always the case. In some states, recording, although required by state law, may not be necessary to protect the tenant's rights. See B-27717, August 12, 1942.

condemn only part of the existing lease. E.g., United States v. General Motors Corp., 323 U.S. 373 (1945). Or, if there is no existing lease, the government can employ condemnation to impose one on the property owner. E.g., Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). The elements of just compensation vary somewhat depending on which of these scenarios applies. Some of the issues are discussed in the Supreme Court decisions cited in this paragraph.

If the determination of just compensation can be resolved administratively, the government is not required to institute formal condemnation proceedings but should adhere as closely as possible to the just compensation principles laid down by the Supreme Court. 25 Comp. Gen. 1 (1945).

Private leases may include a clause, known as an “eminent domain” clause or a “termination on condemnation” clause, which provides that the lease shall terminate if the property is taken by governmental authority. If the government condemns an existing leasehold which is subject to such a provision, the lessee gets nothing. United States v. Petty Motor Co., 327 U.S. 372, 376 (1946); United States v. Advertising Checking Bureau, 204 F.2d 770, 772-73 (7th Cir. 1953); 35 Comp. Gen. 85, 87 (1955); 22 Comp. Gen. 1112, 1114 (1943). The theory is that tenants who enter into leases with such clauses contract away any rights they otherwise might have had. Petty Motor, 327 U.S. at 376; Checking Bureau, 204 F.2d at 772. (These cases illustrate two variations of the clause.)

As with any other acquisition of real property, condemnation of a leasehold requires statutory authority. The general condemnation statute, 40 U.S.C. § 257, discussed earlier in this chapter, operates in exactly the same manner with respect to leaseholds as it does for fee acquisitions. By virtue of this statute, the authority to condemn is co-extensive with the authority to purchase. Thus, the authority in the Federal Property and Administrative Services Act for the General Services Administration to enter into leases (40 U.S.C. § 490(h)), in conjunction with 40 U.S.C. § 257, gives GSA the authority to acquire a leasehold by condemnation. United States v. Checking Bureau, 204 F. 2d 770; United States v. Fisk Building, 99 F. Supp. 592 (S.D. N.Y. 1951); United States v. Midland Nat. Bank of Billings, 67 F. Supp. 268 (D. Mont. 1946).[70]

In our discussion of 41 U.S.C. § 14 in Section B of this chapter, we noted a line of cases establishing the proposition that the authority necessary to satisfy that statute can be found in an appropriation, if it can be shown that the appropriation was intended to be available for the acquisition in question. If that type of authority is sufficient, in conjunction with 40 U.S.C. § 257, to authorize condemnation of the fee, it should also be sufficient to authorize condemnation of a leasehold, a lesser interest. One case, which appears to stand alone, went so far as to find the basic acquisition authority in a general operation (salaries and expenses) appropriation, with no apparent demonstration that Congress was aware of, much less had approved, the lease in question. United States v. Hibernia Bank Bldg., 76 F. Supp. 18 (E.D. La. 1948). While Hibernia does not appear to have been expressly repudiated, it is important to note that it, as well as Midland Bank and its progeny, was decided prior to the statutory requirement for prospectus approval which we will cover later in this discussion. Thus, Hibernia could not be followed today, at least with respect to a lease within the scope of the prospectus requirement. See Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

Another principle which is the same as for fee acquisitions is the principle that statutory cost limitations on voluntary acquisition do not apply to condemnations. 22 Comp. Gen. 1112 (1943). The reason is that just compensation is a constitutional right and cannot be limited by statute. Id. at 1114. (The particular limitation in that case no longer exists, but the principle remains valid.)

b. Application of Fiscal Law Principles

A lease, as a contract requiring the obligation and expenditure of appropriated funds, is subject to the various fiscal statutes and principles discussed throughout this publication the same as any other contract. One area meriting some note is the Antideficiency Act. There are few areas of government contracting in which the desirability of multi-year commitments is stronger than in the case

[70]While these cases dealt with the leasing authority in effect prior to the Federal Property and Administrative Services Act, there is no reason why the point should not apply with equal force to GSA's current authority.

of real property leases. For the most part, Congress has provided multi-year leasing authority. This is fortunate because it has long been settled that, without either such authority or a no-year appropriation, a multi-year lease would violate the Antideficiency Act by purporting to obligate the government for future years, in advance of appropriations for those years.

The story of one such lease will illustrate. A government agency leased space in an office building in 1921, purportedly for 5 years, without statutory authority. At the end of the second year, the government notified the lessor of its intention to terminate the lease and vacate the premises. However, the government's new space was not yet ready, so the agency remained in the leased building and told the lessor that it would continue to pay rent for the period of actual occupancy. The lessor argued that, under state law, it was entitled to rent for at least the full third year. The claim first came to GAO and the answer was no. Since the multi-year lease was unauthorized in the first place, terminating it at the end of the second year could not be a breach. 5 Comp. Gen. 172 (1925). The lessor didn't like this answer and went to court, by now conceding that it could not establish the lease's validity for the full 5-year period, but still trying to recover for the entire third year. The Court of Claims threw the case out on the grounds that it failed to state a cause of action. Goodyear Tire & Rubber Co. v. United States, 62 Ct. Cl. 370 (1926).

The lessor, not overly excited with this result either, took it to the Supreme Court. Unfortunately for the lessor, the Supreme Court had just decided a similar case, Leiter v. United States, 271 U.S. 204 (1926), clearly establishing that a multi-year lease without statutory authority could bind the government only to the end of the fiscal year in which it was made (or, of course, longer period under a multiple-year appropriation). It could be binding in a subsequent year only if there was an available appropriation and if the government took affirmative action—as opposed to mere automatic renewal—to continue the lease. Id. at 207.[71] The disposal of Goodyear's appeal was a straightforward application of Leiter.

[71]Although Leiter has come to be cited as the leading case, it broke little new ground. The principle had already become established by the courts and the accounting officers. E.g., Chase v. United States, 155 U.S. 489 (1894); Smoot v. United States, 38 Ct. Cl. 418 (1903); McCollum v. United States, 17 Ct. Cl. 92 (1881); 5 Comp. Gen. 522 (1926); 5 Comp. Gen. 355 (1925); 1 Comp. Gen. 10 (1921).

Goodyear Tire & Rubber Co. v. United States, 276 U.S. 287 (1928). "Not having affirmatively continued the lease beyond the actual period of occupancy, the Government cannot, under the doctrine of the Leiter case, be bound for a longer term." Id. at 293.

Later GAO decisions applying these principles include 24 Comp. Gen. 195 (1944); 20 Comp. Gen. 30 (1940); 19 Comp. Gen. 758 (1940); and B-7785, March 28, 1940. The sheer number of cases both before and after Leiter suggests the strength of the need that ultimately generated the multi-year leasing statutes we will discuss later. Of course, the case law comes back into play in any situation not covered by one of the statutes, or if the government were to attempt to enter into a lease for a time period in excess of that authorized by statute.

The objection, based on the Antideficiency Act, to indefinite or open-ended indemnification agreements by the government applies fully to indemnity provisions included in a lease. 35 Comp. Gen. 85 (1955).

The existence of multi-year leasing authority by itself does not necessarily tell you how to record obligations under a lease. Some agencies have specific statutory direction. For example, the General Services Administration is authorized to obligate funds for its multi-year leases one year at a time. 40 U.S.C. § 490e. So are the military departments with respect to leases in foreign countries. 10 U.S.C. §§ 2675 (leases for military purposes other than family housing) and 2828(d) (military family housing). Absent such authority, you fall back on the general rule that obligations are chargeable in full to appropriations current at the time they are incurred. Thus, in B-195260, July 11, 1979, GAO advised the Federal Emergency Management Agency, which had no-year appropriations but no authority comparable to 40 U.S.C. § 490e or 10 U.S.C. § 2675, that it could enter into a multi-year lease under its no-year appropriation, but that it had to obligate the full amount of its obligations under the lease at the time the lease was signed. Actual payments, of course, would be made periodically over the term of the lease.

The constitutional immunity of the United States from state and local taxes imposed on property which the government owns does not extend to property which the government leases. Taxes imposed on the owner are simply part of the consideration or rent which the government, as tenant, agrees to pay. 24 Comp. Dec. 705 (1918). A government lease, especially a long-term one, may include a "tax adjustment" clause under which the government agrees to share proportionately in any increases or decreases in applicable real estate taxes. See 48 C.F.R. §§ 570.702-15 and 552.270-24 (sample clause). Without such a clause, there is no authority for the government to increase its rent payments to compensate for tax increases unless there is also some other modification or amendment to constitute legal consideration. B-169004, March 6, 1970.

c. Rights and Obligations

While the Contract Disputes Act does not apply to contracts for "the procurement of . . . real property in being" (41 U.S.C. § 602(a)(1)), this exemption has not been construed as applying to leases. Therefore, claims and disputes arising under a lease are governed by the requirements and procedures of the Contract Disputes Act. Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985) (the leading case); Jackson v. USPS, 799 F.2d 1018 (5th Cir. 1986); United States v. Black Hawk Masonic Temple Ass'n, 798 F. Supp. 646 (D. Colo. 1992); Goodfellow Bros., Inc., AGBCA No. 80-189-3, 81-1 B.C.A. ¶ 14,917 (1981); Robert J. DiDomenico, GSBCA No. 5539, 80-1 B.C.A. ¶ 14,412 (1980). However, as with other types of government contracts, the Contract Disputes Act does not extend to protests against the award of, or failure to award, a lease. Arthur S. Curtis, GSBCA No. 8867-P-R, 88-1 B.C.A. ¶ 20,517 (1988) (government in that case was lessor).

The traditional view among the courts, boards of contract appeals, and GAO has been that rights and obligations under a lease to which the federal government is a party are questions of federal, rather than state, law. E.g., Forman v. United States, 767 F. 2d 875; Girard Trust Co. v. United States, 161 F.2d 159 (3d Cir. 1947); Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974); Brooklyn Waterfront Terminal Corp. v. United States, 90 F. Supp. 943 (Ct. Cl. 1950); Goodfellow Bros., Inc., 81-1 B.C.A. ¶ 14,917; 49 Comp. Gen. 532, 533 (1970); B-174588, May 17, 1972, aff'd on recons., B-174588, September 6, 1972. The same is true with respect to lease formation. E.g., United States v. Bedford Assoc., 657 F.2d 1300, 1309-10 (2d Cir. 1981), cert. denied, 456 U.S. 914 (1982). Under this approach, the decision maker is free to choose what it regards as the better view when state laws are not uniform. E.g., Keydata, 504 F.2d at 1122-24.

There is also a line of cases involving United States Postal Service leases which, while recognizing their power to apply federal law, decline to do so and instead apply state landlord-tenant law. Powers v. USPS, 671 F.2d 1041 (7th Cir. 1982); Reed v. USPS, 660 F. Supp. 178 (D. Mass. 1987); Jackson v. USPS, 611 F. Supp. 456 (N.D. Tex. 1985). The advantage of using state law is that every state has an established body of landlord-tenant law whereas federal courts deal with these issues infrequently. It is no coincidence that these cases, from the district courts and numbered circuits, all involve Postal Service leases because federal lease cases involving agencies other than the Postal Service would mostly go on appeal to the Court of Appeals for the Federal Circuit. Forman, 767 F.2d at 880 n.6; Reed, 660 F. Supp. at 181. Indeed, since appeals under the Contract Disputes Act go to the Federal Circuit, the Postal Service Board of Contract Appeals follows its governing circuit (the Forman case) and applies federal law. N.J. Hastetter, Trustee, PSBCA No. 3064, 92-3 B.C.A. ¶ 25,189 (1992).

As with contracts in general, rights and obligations under a lease are determined primarily by reference to the terms the parties agreed upon, as embodied in the lease agreement. E.g., Girard Trust Co., 161 F.2d at 161. A number of contract clauses used in General Services Administration leases are described in 48 C.F.R. Subpt. 570.7. In addition, there are certain "implied covenants" that the courts will read in unless the lease expressly provides otherwise.

For example, the landlord is frequently obligated to keep the premises in good repair. See 48 C.F.R. §§ 570.702-3 and 552.270-12 (clause). If the landlord violates this provision, the government can make the repairs and deduct their cost from rent payments. 48 C.F.R. §§ 570.702-8 and 552.270-17. In addition, every lease includes an "implied covenant of quiet enjoyment." United States v. Bedford Assoc., 548 F. Supp. 732, 740 (S.D.N.Y. 1982), modified on other grounds and aff'd, 713 F.2d 895 (2d Cir. 1983). Significant breach of the repair clause or the implied covenant can trigger the government's right to terminate the lease under a default clause if the lease contains one or, if the lease does not contain a default clause, under the common-law concept of "constructive eviction."

A constructive eviction is wrongful conduct by the lessor which (1) renders the premises unfit for the purpose leased, or (2) deprives the tenant of the beneficial use and enjoyment of the premises.

David Kwok, GSBCA No. 7933, 90-1 B.C.A. ¶ 22,292 (1989), aff'd mem., 918 F.2d 187 (Fed. Cir. 1990); Hugh L. Nathurst III, GSBCA No. 9284, 89-3 B.C.A. ¶ 22,164 (1989); J.H. Millstein and Fanny Millstein, GSBCA Nos. 7665 and 7904, 86-3 B.C.A. ¶ 19,025 (1986). A construction eviction requires more than some minor deviation. For a vivid example of facts supporting a constructive eviction, see Kwok, 90-1 B.C.A. at 111,959. Under a constructive eviction, the government's obligation to pay rent ceases, but the government, as tenant, must vacate the premises within a reasonable time. Bedford Assoc., 548 F. Supp. at 741; Richardson v. United States, 17 Cl. Ct. 355, 357 (1989). Disruption incident to the making of repairs is not a constructive eviction. Millstein, 86-3 B.C.A. at 96,084. Conversely, continued occupancy in reliance on the lessor's promise of repair does not waive the government's right to assert a constructive eviction. Nathurst, 89-3 B.C.A. at 111,541.

A lease may require the lessee to restore the premises to the condition they were in at the beginning of the lease, reasonable wear and tear excepted. Claims under provisions of this sort are discussed in Chapter 12. As with the "good repair" clause, even in the absence of an express provision in the lease, there is an implied covenant which may produce much the same result. Unless the lease expressly provides otherwise, every lease includes an implied covenant against voluntary waste, under which the government can be held liable for negligent damage to the premises. United States v. Bostwick, 94 U.S. 53 (1876); New Rawson Corp. v. United States, 55 F. Supp. 291 (D. Mass. 1943); Mount Manresa v. United States, 70 Ct. Cl. 144 (1930); Italian National Rifle Shooting Soc'y v. United States, 66 Ct. Cl. 418 (1928). This covenant, "construed with reference to the intended use of the property by the lessee," "also requires restoration of the premises to the lessor in the same condition as received, reasonable wear and tear excepted." Brooklyn Waterfront Terminal Corp. v. United States, 90 F. Supp. 943, 949 (Ct. Cl. 1950). See also United States v. Jordan, 186 F.2d 803, 806 (6th Cir. 1951), aff'd per curiam, 342 U.S. 911 (1952). By virtue of the covenant against voluntary waste, appropriate restoration costs are a proper charge to appropriated funds. 26 Comp. Gen. 585 (1947); 25 Comp. Gen. 349 (1945).

A provision whose status is somewhat clouded is the Termination for Convenience clause required in government procurement contracts generally. The government has regarded the "T for C" clause as inappropriate in leases of real property, and General Services Administration leases do not include a "T for C" clause. The reason, the GSA Board of Contract Appeals has suggested, is that the clause:

> "would enable the Government to cancel the lease at any time without liability for future rent, and would therefore so vitiate the agreement on a fixed lease term that it might render the apparent lease agreement nugatory." Yucca, A Joint Venture, GSBCA Nos. 6768, 7319, 85-3 B.C.A. ¶ 18,511 (1985) at 92,969.

One practical consequence of this is the inability to recommend termination where a lease is found to have been improperly awarded. E.g., 72 Comp. Gen. 335, 339 (1993); B-214648, December 26, 1984. However, one court has stated that a termination for convenience clause is incorporated in a lease of real property by operation of law. Aerolease Long Beach v. United States, 31 Fed. Cl. 342, order on stay pending appeal, 31 Fed. Cl. 372, 374 (1994). Whether a lease could expressly disclaim the "T for C" authority does not yet appear to have been addressed.

Wholly apart from the presence or absence of a termination for convenience clause, paragraph 4 of the U.S. Government Lease for Real Property, Standard Form 2, provides that:

> "The Government may terminate this lease at any time by giving at least ___ days' notice in writing to the Lessor and no rental shall accrue after the effective date of termination."

The parties then insert the desired notification period. This provision has occasionally been stricken from the lease, essentially for the same reason there is no "T for C" clause—the apparent inconsistency with the fixed term of the lease. E.g., David Kwok, GSBCA No. 7933, 90-1 B.C.A. ¶ 22,292 (1989) at 111,960. However, where the provision is used, it becomes part of the contract and is enforced as such. Darrel Stebbins, AGBCA No. 91-164-1, 93-1 B.C.A. ¶ 25,236 (1992); Capricorn Enterprises, Inc., AGBCA No. 89-125-1, 90-1 B.C.A. ¶ 22,587 (1990).

d. Payment of Rent

"The primary obligation of a tenant is to pay rent." Jackson v. United States Postal Service, 611 F. Supp. 456, 460 (N.D. Tex. 1985). Rent has been defined as "compensation for the use, enjoyment and occupation of real estate." B-106578, August 29, 1952. The lease (paragraph 3 of the Standard Form 2) will state the amount of rent and the intervals at which it is to be paid. Where rent is paid monthly, the monthly amount, unless the lease specifies differently, is one-twelfth of the annual rental regardless of variations in the number of days from month to month. 24 Comp. Gen. 838 (1945).

The government pays either by check or, at the lessor's option, electronic funds transfer. See 48 C.F.R. §§ 532.908(c) and 552.232-73. The Prompt Payment Act applies to leases. 31 U.S.C. § 3901(a)(6). GSA's regulations incorporating this requirement are 48 C.F.R. §§ 532.908(b) and 552.232-71.

(1) Advance payment

By virtue of the prohibition on advance payments found in 31 U.S.C. § 3324(b), the United States cannot make rental payments in advance but must pay in arrears. The prohibition applies to the lease of "naked lands" as well as buildings. 23 Comp. Dec. 653 (1917). GSA's regulations provide that rent is due on the first workday of each month (48 C.F.R. § 552.232-71, subpara. (a)(1)), but the payment covers the month that has just ended rather than the month that is beginning.

The same nonstatutory exceptions apply in the case of leases as apply to advance payments in general. Thus, where the lessor is a state, rent may be paid in advance because the possibility of loss is regarded as sufficiently remote. 57 Comp. Gen. 399 (1978). See also B-207215, March 1, 1983, applying the exception to a National Park Service lease from a statutorily created nonprofit foundation whose governing board included the Secretary of the Interior and the Director of the Park Service. That decision also emphasized that, in view of the bona fide needs rule, payment in advance means advance for the fiscal year (or other fixed term of the paying appropriation). Rent being paid pursuant to a condemnation award may be paid in advance to the extent necessary to satisfy the award. 22 Comp. Gen. 1112 (1943).

In addition, Congress may legislate exceptions to the advance payment prohibition and has done so in a number of instances. Examples are 22 U.S.C. § 2670(h) (State Department leases for the use of the Foreign Service abroad) and 10 U.S.C. § 2661(b)(1) (certain military leases).

(2) Payment to legal representative

The common-law rule is that rent which has accrued prior to the lessor's death is payable to the executor or administrator; rent which accrues after the lessor's death vests in the heir (intestate succession) or devisee (person named in will), unless otherwise provided by statute or will or unless the property has been formally brought into administration proceedings prior to accrual of the rent. B-116413, August 19, 1953. For an example of a state statute which modifies the common-law rule by requiring payment of posthumous rent to the legal representative, see B-36636, September 14, 1943. Of course, the common-law rule does not apply in the case of property held jointly with right of survivorship, such as property owned by a husband and wife as tenants by the entirety, in which case rent is payable to the surviving co-owner. B-140816, October 27, 1959.

Where rent is being paid to an executor or administrator, the voucher should include a statement to the effect that the payee is continuing to serve in that capacity. 9 Comp. Gen. 154 (1929); B-127362, April 13, 1956. The purpose is to safeguard against making payment to someone who has been discharged as legal representative, an improper payment which could put a certifying officer at risk. This does not mean that the certifying officer has to run to the courthouse every month before certifying the payment voucher. While this would not eliminate the potential for personal liability, the lessor can be required to submit a statement to be attached to the voucher. B-57612, June 18, 1946.

Before entering into a new lease with an executor or administrator, the agency must be careful to determine that the executor or administrator is authorized to lease the decedent's property. This usually requires the permission of the probate court. In 16 Comp. Gen. 820 (1937), an executor leased property to the government at a rent lower than that authorized by the court. Since the executor had exceeded his authority, no binding lease resulted and the government was liable for the fair rental value of the property.

(3) Assignment of Claims Act

As discussed in detail in Chapter 12, the Assignment of Claims Act—31 U.S.C. § 3727 and 41 U.S.C. § 15—(1) prohibits the assignment of claims against the United States except under fairly restrictive conditions, (2) prohibits the transfer of government contracts, and (3) authorizes the assignment of contract proceeds to financing institutions. This legislation impacts the payment of rent under leases in several ways. Starting with 31 U.S.C. § 3727, the prohibition on assignments applies to a lessor's right to receive rent. The government is not bound to recognize an assignment not in compliance with the statute. E.g., Webster Factors, Inc. v. United States, 436 F.2d 425 (Ct. Cl. 1971); B-204237, October 13, 1981.

To avoid problems under the anti-assignment legislation, early decisions[72] developed the following guidelines for payment:

- If an agent executes the lease on behalf of the principal under a proper power of attorney, rent may be paid to the agent.
- Rent may be paid to an agent if the lease itself so specifies.
- If neither of the above applies, the check for rent must be drawn payable to the principal, although it may be delivered to an agent.

If payment to an agent is authorized to begin with, it may be made to a successor agent. 6 Comp. Gen. 737 (1927); B-36636, September 14, 1943.

Application of the Assignment of Claims Act to leases is essentially the same as in other contexts. Thus, the prohibition applies to voluntary assignments and not to assignments by operation of law. E.g., Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974) (assignment under court order). Also, since the prohibition is for the government's protection, the government can choose to waive the statute and recognize an assignment. Freedman's Saving and Trust Co. v. Shepherd, 127 U.S. 494 (1888). See also 11 Comp. Gen. 278 (1932). As with government contracts in general, the government can include a provision authorizing the assignment of rent payments to a financing institution, and will then be bound by a proper assignment. See Webster Factors, Inc. v. United States, cited above.

The prohibition in 41 U.S.C. § 15 on the transfer of contracts comes into play when the lessor of property leased to the government sells

[72] 16 Comp. Gen. 867 (1937); 10 Comp. Gen. 31 (1930); 5 Comp. Gen. 749 (1926); 9 Comp. Dec. 611 (1903). (Each case does not include every point.)

the property. An early Supreme Court case, Freedman's Saving and Trust Co. v. Shepherd, cited above, held that the prohibition

"does not embrace a lease of real estate to be used for public purposes, under which the lessor is not required to perform any service for the government, and has nothing to do, in respect to the lease, except to receive from time to time the rent agreed to be paid. The assignment of such a lease is not within the mischief which Congress intended to prevent." 127 U.S. at 505.

There is no reason this holding would not remain valid under the stated conditions. Especially with respect to buildings, however, many modern leases are different. The General Services Administration Board of Contract Appeals has held that the principle of the Shepherd case does not apply to:

"a contemporary GSA lease, involving a host of services and supplies to be provided by the lessor. The transfer of this lease without the consent of the Government might not only subject the Government to multiple litigation with unknown parties, but might, at each turn, subject the Government to detrimental alteration in the performance of contractual services." Broadlake Partners, GSBCA No. 10713, 92-1 B.C.A. ¶ 24,699 (1991), at 123,270.

Of course, as with assignments under 31 U.S.C. § 3727, the government can consent to the transfer. See Albert Ginsberg, GSBCA No. 9911, 91-2 B.C.A. ¶ 23,784 (1991).

In 1992, subsequent to the Broadlake Partners decision, GSA amended its "successors bound" clause to read as follows:

"This lease shall bind, and inure to the benefit of, the parties and their respective heirs, executors, administrators, successors and assigns." 48 C.F.R. § 552.270-18 (emphasis added).

This clause is required in larger leases and optional in smaller ones. 48 C.F.R. § 570.702-9. The 1992 amendment added the underscored language. While there appear to be no published decisions interpreting the amendment, it is at least arguable that the clause amounts to a blanket consent. See United States v. Jordan, 186 F.2d 803, 808 (6th Cir. 1951), aff'd per curiam, 342 U.S. 911 (1952).

2. Statutory Authorities and Limitations

a. Federal Property and Administrative Services Act

The major portion of the federal government's leasing is done by the General Services Administration, which serves as the government's chief "leasing agent."[73] As a general proposition, an agency which needs space must get it through GSA. The agency may do its own leasing only if it has specific statutory authority to do so, or upon a delegation from GSA.

GSA's leasing authority is the combined product of several provisions of law. The primary source is the Federal Property and Administrative Services Act of 1949, as amended, which authorizes GSA to enter into leases for terms of up to 20 years. Specifically, section 210(h)(1) of the Act, 40 U.S.C. § 490(h)(1), authorizes the Administrator of GSA to

> "enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods in excess of twenty years for each such lease agreement, on such terms as he deems to be in the interest of the United States and necessary for the accommodation of Federal agencies in buildings and improvements which are in existence or to be erected by the lessor for such purposes and to assign and reassign space therein to Federal agencies."

Around the same time, section 1 of Reorganization Plan No. 18 of 1950, 40 U.S.C. § 490 note, promulgated pursuant to the Reorganization Act of 1949 (5 U.S.C. §§ 901-912), transferred "[a]ll functions with respect to acquiring space in buildings by lease . . . from the respective agencies in which such functions are now vested" to GSA, except for (1) buildings in foreign countries, (2) buildings on military facilities, (3) post office buildings, and (4) "special purpose" space not generally suitable for the use of other agencies, such as hospitals, jails, and laboratories. Still another provision of the Federal Property and Administrative Services Act, 40 U.S.C. § 490(d), gives the Office of Management and Budget permanent authority to transfer to GSA functions "vested in any other Federal agency with respect to the operation,

[73]Before GSA was created, many of the government's real property functions were performed by the Federal Works Agency. See 40 U.S.C.§ 753; 65 Comp. Gen. 722, 725 (1986).

maintenance, and custody of any office building" owned or leased by the government, with exceptions similar to those found in the 1950 reorganization plan.

GSA's leasing authority under 40 U.S.C. § 490(h) is not limited to the executive branch. This is because the authority applies with respect to "Federal agencies," which term is defined in 40 U.S.C. § 472(b) to mean

> "any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction."

Thus, legislative branch entities except those specified must lease office space through GSA absent authority to do otherwise by statute or delegation. B-202206, June 16, 1981. So must the Administrative Office of the United States Courts. 54 Comp. Gen. 944 (1975). The Supreme Court building is exempt from GSA's authority, however, because 40 U.S.C. § 13a places it under the control of the Architect of the Capitol. 54 Comp. Gen. at 947.

The statute further defines "executive agency" as including wholly owned government corporations. 40 U.S.C. § 472(a). Therefore, by its terms, it does not apply to mixed-ownership government corporations. Similarly, Reorganization Plan No. 18 is regarded as applicable to wholly owned, but not mixed ownership, government corporations. 38 Comp. Gen. 565 (1959).

The 20-year term authorized by 40 U.S.C. § 490(h) refers to the length of time that the government is obligated to pay rent. Thus, a lease-construction agreement which provides for a two to three year lead time for construction of the building, with the 20-year term of occupancy and the government's obligation to pay rent to begin upon completion of construction, does not violate the statute. B-191888, May 26, 1978.

GSA finances its leasing operations from the Federal Buildings Fund, a revolving fund established by 40 U.S.C. § 490(f). Money in the Fund is available for expenditure as specified in annual appropriation acts. 40 U.S.C. § 490(f)(2). A recurring general provision authorizes any department or agency to use its operating appropriations to pay GSA's charges for space and services furnished by law. E.g., Treasury, Postal Service, and General

Government Appropriations Act, 1994, Pub. L. No. 103-123, § 607, 107 Stat. 1226, 1260. Funds for multi-year leases under 40 U.S.C. § 490(h) are obligated one fiscal year at a time. 40 U.S.C. § 490e.

This funding scheme does not give the tenant agency the same rights against GSA that a commercial tenant would have against a commercial landlord. Thus, GSA is not liable to the tenant agency for damage to the agency's property caused by building defects, although GSA should of course try to recover from the lessor. 57 Comp. Gen. 130 (1977).

There is still another funding provision on the books, 40 U.S.C. § 304c, which predates the Federal Property and Administrative Services Act. It provides:

> "To the extent that the appropriations of the General Services Administration not otherwise required are inadequate therefor, [GSA] may require each Federal agency to which leased space has been assigned to pay promptly by check to [GSA] out of its available appropriations, either in advance or during the occupancy of such space, all or part of the estimated cost of rent, repairs, alterations, maintenance, operation, and moving. . . ."

While the creation of the Federal Buildings Fund has diminished the significance of 40 U.S.C. § 304c, it remains as a backup. It does not, however, alter or expand the availability of the tenant agency's appropriations. B-62051, January 17, 1947.

If GSA enters into a lease under its statutory authorities, GSA, not the tenant agency, must make any necessary amendments or modifications. A lease executed by GSA may not be amended or modified by an agreement between the tenant agency and the lessor. 38 Comp. Gen. 803 (1959); 32 Comp. Gen. 342 (1953).

It is possible that the tenant agency's needs might change such that it no longer needs the leased premises for the full term of the lease. Should this happen, the unexpired term of the lease can be declared "excess," in which event other government agencies should be canvassed, the same as with other forms of excess property, to see if any other agency needs the premises. If not, GSA can declare the unexpired term "surplus" and sublet the premises, depositing rental receipts to the Federal Buildings Fund to be used to provide services to the new tenant or to pay rent to the original lessor. 40 U.S.C. § 490(h)(2). Alternatively, depending on a variety of circumstances, it may be in the government's interest to invoke whatever cancellation terms the lease provides. See B-119782, July 9, 1954, in which cancellation was the cheapest alternative.

GSA implements its leasing authority in the Federal Property Management Regulations, specifically 41 C.F.R. Subpt. 101-18.1. Section 101-18.101(a) reflects GSA's broad authority:

> "GSA will perform all functions of leasing building space, and land incidental thereto, for Federal agencies except as provided in this subpart."

Subject to certain exceptions, the Federal Property and Administrative Services Act authorizes GSA to delegate, and to authorize successive redelegation of, any function transferred to or vested in GSA by that act. 40 U.S.C. §§ 486(c) and (d). This includes leasing. The GSA regulations provide for a wide variety of delegations:

- Agencies may do their own leasing, for terms of not more than one year, when space is leased for no rental or a nominal rental of $1 a year. 41 C.F.R. § 101-18.104(a)(1).[74]
- GSA may grant specific delegations upon request. 41 C.F.R. § 101-18.104(a)(2).
- GSA may grant categorical delegations, under which any agency may do its own leasing for specified purposes. 41 C.F.R. § 101-18.104(a)(3). Existing categorical delegations are listed in 41 C.F.R. § 101-18.104-2 and include such things as greenhouses, hangars, hospitals, housing, and ranger stations.
- GSA may grant "special purpose" delegations for space not generally suitable for use by other agencies. 41 C.F.R. § 101-18.104(a)(4). Existing special purpose delegations are listed in 41 C.F.R. § 101-18.104-3.
- The Departments of Agriculture, Commerce, and Defense may lease their own building space, and incidental land, for terms not to exceed 5 years, when the space is situated outside any of the "urban centers" listed in the regulations. 41 C.F.R. § 101-18.104(b).

[74]GAO has defined "nominal rental" somewhat more broadly, as denoting "a consideration wholly unrelated to the actual or fair market value of the leased premises, such as $1 per annum." 35 Comp. Gen. 713, 714 (1956). Naturally, for purposes of the property management regulations, GSA's definition controls.

Since what is being delegated is the authority GSA possesses under 40 U.S.C. § 490(h), the delegation includes the authority to enter into multi-year leases for terms of up to 20 years. 41 C.F.R. § 101-18.104-1(b).

b. Prospectus Requirement

The acquisition of real property, including leaseholds, requires legislative authorization. For major leases, a component of this authorization is the prospectus approval requirement of 40 U.S.C. § 606(a). This is not part of the Federal Property and Administrative Services Act but rather is the amended version of section 7(a) of the Public Buildings Act of 1959. As relevant to leases, it provides:

> "No appropriation shall be made to lease any space at an average annual rental in excess of $1,500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on [Transportation and Infrastructure] of the House of Representatives. . . . For the purpose of securing consideration for such approval, the Administrator [of GSA] shall transmit to the Congress a prospectus of the proposed facility . . . ."

Section 606(a) then goes on to specify the contents of the prospectus, to include, among other things: a brief description of the space to be leased, the location of the space, an estimate of the maximum cost to the United States, a comprehensive plan addressing the space needs of all government employees in the locality, and a statement of how much the government is already spending to accommodate the employees who will occupy the space to be leased.[75]

The application of section 606(a) to leases was not in the original Public Buildings Act. Enacted as part of the Public Buildings Amendments of 1972, it was the outgrowth of appropriation act provisions used throughout most of the 1960s to control lease-construction arrangements. See Merriam v. Kunzig, 476 F.2d 1233, 1237-39 (3d Cir. 1973), cert. denied, 414 U.S. 911. As enacted, however, the requirement applies "to all leases, and not merely to

[75]Section 606(a) includes three distinct prospectus requirements: (1) construction, acquisition, or alteration of public buildings, (2) leasing, and (3) alteration of leased space. The first and third appear elsewhere in this chapter. To minimize duplication, we have consolidated our coverage of material which applies equally to all three types, including the effect of noncompliance, later under the Public Buildings Act heading.

leases for buildings to be erected by the lessor." Id. at 1239. The threshold, originally $500,000, was raised to $1,500,000 by the Public Buildings Amendments of 1988, Pub. L. No. 100-678, § 2, 102 Stat. 4049. GSA can adjust the amount annually in the manner and to the extent authorized in 40 U.S.C. § 606(f).

The monetary threshold applies to the "average annual rental." GSA and GAO agree that "rental" in this context means the amount of consideration for use of the land and buildings, or portions of buildings, during the firm term of the lease, excluding the cost of any services such as heat, light, water, and janitorial services. 52 Comp. Gen. 230 (1972). When leasing on a "single rate" basis, in which charges for services and utilities are included in the per square foot rental rate, GSA requires the lessor to submit a statement of the estimated annual cost of services and utilities, which GSA uses to determine the net rental. If it believes the lessor's figures are inaccurate, GSA may adjust the estimate. Id. at 232.

Apart from 40 U.S.C. § 606(c) which authorizes the rescission of approval if an appropriation has not been enacted within one year, the statute does not impose time limits on the approval process. However, delay may have adverse consequences. One court has held that delay by GSA in obtaining prospectus approval, during a time when construction costs were increasing rapidly, excused the lessor from any duty to renovate the premises. United States v. Bedford Assoc., 548 F. Supp. 732, 737 (S.D.N.Y. 1982), modified on other grounds and aff'd, 713 F.2d 895 (2d Cir. 1983).

Since the statute requires GSA to submit the prospectus, an agency which is doing its own leasing under a delegation from GSA must submit its prospectus to GSA who will in turn submit it to the Congress. 41 C.F.R. § 101-18.104-1(c).

c. Site Selection

It is, as it should be, up to the leasing agency to determine where those premises should be located, and that determination should not be second-guessed as long as it has a rational basis. 59 Comp. Gen. 474, 480 (1980); B-190730, September 26, 1978. For example, GAO regards geographical restrictions, such as "city limits" restrictions, based on considerations of employee travel time, as reasonable. B-230660, May 26, 1988; B-227849, September 28, 1987.

Of course, nothing is that simple. Section 101-17.205(a) of 41 C.F.R. ch. 101, subch. D, App. states the truism that the agency's determination must be "in accordance with all applicable statutes, regulations and policies." This is alluding to the fact that the leasing of real property, like virtually every other form of federal contract, is designed to serve various social and economic purposes in addition to meeting the government's needs.

One such purpose is the preservation of historic properties. The National Historic Preservation Act directs agencies to seek out and use "historic properties available to the agency" before leasing other buildings. 16 U.S.C. § 470h-2(a). Another provision of law directs GSA to "acquire and utilize space in suitable buildings of historic, architectural, or cultural significance, unless use of such space would not prove feasible and prudent compared with available alternatives." 40 U.S.C. § 601a(a)(1). "Historic, architectural, or cultural significance" for the most part means buildings listed or eligible to be listed on the National Register established under the Historic Preservation Act. 40 U.S.C. § 612a(4). While one court has held that 40 U.S.C. § 601a(a)(1) does not apply to properties which GSA is leasing for other agencies, the policy has been incorporated into Executive Order No. 12072 (1978), reprinted at 40 U.S.C. § 490 note, which does apply. Birmingham Realty Co. v. GSA, 497 F. Supp. 1377, 1384-86 (N.D. Ala. 1980).

A solicitation of offers for a lease should state how the historic building preference will be applied. 62 Comp. Gen. 50 (1982). Under a clause prescribed for major leases, the historic building will get the award if it meets the terms and conditions of the solicitation, and if the rental is no more than 10 percent higher than the lowest otherwise acceptable offer. 48 C.F.R. §§ 570.701-4 and 552.270-4.

None of the authorities thus far noted purport to address the consequences of disregarding the historic building preference. In the Birmingham Realty case cited above, the court found that GSA had failed to comply with the executive order, but that the unsuitability of the historic building for the purposes for which the space was needed outweighed the noncompliance. 497 F. Supp. at 1386-87.

The choice between urban and rural locations introduces additional requirements. A provision enacted as part of the Rural Development

Act of 1972, now found at 42 U.S.C. § 3122(b), designed to improve rural economic and living conditions, requires federal agencies to give "first priority to the location of new offices and other facilities in rural areas." Section 1-103 of Executive Order No. 12072, designed to strengthen cities, requires federal agencies to "give first consideration to a centralized community business area and adjacent areas of similar character" when meeting space needs in urban areas. "First consideration" means preference. City of Reading v. Austin, 816 F. Supp. 351, 362 (E.D. Pa. 1993).

While these preferences may seem incompatible, they are not. Because it is statutory, the rural preference must be considered first. The central business area preference comes into play only after it is determined that the need must be met in an urban area. 59 Comp. Gen. 474, 480 (1980); 59 Comp. Gen. 409, 414 (1980). Also, the applicable definitions of "urban area" and "rural area" produce an overlap such that a community with a population between 10,000 and 50,000 is both. 59 Comp. Gen. at 414; B-95136, March 10, 1980.

The City of Reading court noted that Executive Order No. 12072 "provides no meaningful benchmarks for a court to effectively evaluate GSA's ultimate decision," and that the decision involves "managerial and economic choices dependent on GSA's special expertise . . . not readily subject to judicial review." Therefore, the review should not be a review of the merits of the decision, but should seek "to ensure a fully informed and well-considered decision." 816 F. Supp. at 360.

A final area which may affect the location decision, at least for major leases, is environmental impact. The National Environmental Policy Act does not, by express terms, either include or exclude leasing actions. The case of S.W. Neighborhood Assembly v. Eckard, 445 F. Supp. 1195 (D.D.C. 1978), held that a congressionally approved 5-year $11 million lease of a 9-story office building to be built in an industrial/residential neighborhood and which would involve the relocation of over 2,000 federal employees was a "major federal action" for purposes of 42 U.S.C. § 4332, and that the government therefore was required to prepare an environmental impact statement. In Birmingham Realty Co. v. GSA, 497 F. Supp. at 1383-84, on the other hand, the court found reasonable a GSA policy to categorically exclude leases of less than 20,000 square feet from environmental impact statement requirements.

d. Parking

As discussed in Chapter 4, a government employee does not have a right to a parking space, with or without charge, and an agency is under no obligation to furnish one. See American Federation of Government Employees v. Freeman, 498 F. Supp. 651, 654-655 (D.D.C. 1980) (government employee does not have a "property interest in free parking"); B-168096, December 6, 1975 (furnishing of parking is not a right but a privilege). Nevertheless, the government may choose to provide parking facilities as an aid to operating efficiency, employee morale and retention. E.g., 63 Comp. Gen. 270, 271 (1984); B-168096, January 5, 1973. From the availability of appropriations perspective, it makes no difference whether the employees work in government-owned space or in leased space. B-152020, July 28, 1970.

When GSA is leasing office space pursuant to its authority under the Federal Property and Administrative Services Act, it may include parking facilities, and the tenant agency's appropriations are available to reimburse GSA for the parking space to the same extent as for the office space itself. 72 Comp. Gen. 139 (1993); 55 Comp. Gen. 897 (1976). See also 49 Comp. Gen. 476 (1970); B-168946, February 26, 1970 (same point prior to establishment of Federal Buildings Fund).

GSA will not require an agency to accept and pay for parking space it does not need. 55 Comp. Gen. at 901. If an agency has parking space which is excess to its needs, it may relinquish that space in accordance with procedures in GSA's Federal Property Management Regulations. Id.

In some cases, the office space lease may not include parking, or the agency's needs may change over time. As with leasing in general, an agency otherwise subject to the Federal Property and Administrative Services Act may not lease its own parking facilities unless it has specific statutory authority (an example relating to NASA is discussed in B-155372-O.M., November 6, 1964) or a delegation of authority from GSA. B-162021, July 6, 1977. At one time, an agency which needed parking accommodations not included in the basic office space lease would simply make the request to GSA and GSA would lease the space on behalf of the agency subject to reimbursement. See 55 Comp. Gen. 1197, 1200 (1976); B-162021, supra. Under current procedures, the agency must first make a request to GSA to determine if any government-controlled space (owned or leased) is available. If such space is not available, the agency may then, without any further authorization from GSA, "use its own procurement authority to acquire parking by service contract." 41 C.F.R. ch. 101, Subch. D. App., § 101-17.202-2(a) (1994). This operates as a blanket delegation.

The agency is no longer required to certify to GSA that the parking is needed for purposes of employee morale or operating efficiency, although it is still expected to use the same standard. 72 Comp. Gen. 139, 141 (1993); 63 Comp. Gen. 270, 271 (1984).

The government has the discretionary authority under the Federal Property and Administrative Services Act to charge employees for parking space furnished for their use. American Federation of Government Employees v. Carmen, 669 F.2d 815 (D.C. Cir. 1981). See also 55 Comp. Gen. 897 (1976); 52 Comp. Gen. 957, 960-61 (1973); B-155817, March 11, 1966. The Carmen case involved a plan, subsequently withdrawn, to phase out free parking as an energy conservation measure.

An airport parking permit, renewable annually, procured for use by staff on official travel as a cost savings measure, which does not reserve any particular space or in fact guarantee any space at all if the parking lot is full, is not a lease for purposes of the Federal Property Act and regulations. B-259718, August 25, 1995. The purchase is permissible under the "necessary expense" doctrine. Id.

e. Repairs and Alterations

The following definitions are taken from 20 Comp. Gen. 105, 109 (1940) and the specific examples from 20 Comp. Dec. 73, 74 (1913):

- Repair means "to mend, to restore to a sound state whatever has been partially destroyed, to make good an existing thing, restoration after decay, injury, or partial destruction," in plain English, to fix something that needs to be fixed. Examples are replacing a broken pane of glass in a window or fixing broken stairs.
- Alteration means "a change or substitution in a substantial particular of one part of a building for another part of a building different in that particular" or "an installation that becomes an integral part of the building and changes its structural quality." Examples are erecting a partition dividing one room from another, closing up a door or window, or cutting a new door or window.

In addition, the cited decisions define a third term, "improvement," to mean "a valuable and useful addition, something more than a mere repair or restoration to the original condition," for example, strengthening the foundation or walls or putting on a new roof. It should be apparent that these are merely working definitions, not rigid demarcations. Many alterations, for example, are also "improvements."[76]

Before funding comes into play, the first question to ask is whether the given item of work is the responsibility of the lessor or the lessee. The guiding principle is the rather obvious one that the government should not be paying for something which is the landlord's obligation under the lease. E.g., 17 Comp. Gen. 739, 740 (1938). See also B-198629, July 28, 1980.

The terms of the lease should allocate responsibilities, at least in general terms. For example, under one clause commonly found in government leases, the lessor agrees, except for damage resulting from the government's negligence, to maintain the premises in good repair and condition suitable for the government's use and capable of supplying heat, air conditioning, light, and ventilation. 48 C.F.R. § 552.270-12. A provision of this type imposes a continuing obligation on the lessor to make needed repairs or provide the specified services throughout the life of the lease in connection with the purpose for which the space was rented. United Post Offices Corp. v. United States, 80 Ct. Cl. 785 (1935); United Post Offices Corp. v. United States, 79 Ct. Cl. 173 (1934); 38 Comp. Gen. 803 (1959); 20 Comp. Gen. 327 (1940); 15 Comp. Gen. 483 (1935); 6 Comp. Gen. 250 (1926). As noted earlier under the Rights and Obligations heading, if the lessor fails or refuses to meet this obligation, the government can have the necessary work done and deduct the cost from future rent. E.g., 80 Ct. Cl. at 792; 6 Comp. Gen. at 251-252.

Alterations are of two general types: those necessary at the outset of the lease to make the space suitable for the government's needs

[76]Any discussion of repairs and alterations must necessarily implicate the general rule against using appropriated funds to make permanent improvements to private property. That rule, and its application to leased property, are discussed later in this chapter. The remainder of this section presupposes that, for whatever reason, the rule does not pose an impediment.

(such as converting space from one use to another) and those which may become necessary from time to time over the course of the lease to meet changing needs. As with repairs, appropriated funds are not available to make alterations if and to the extent the lessor has assumed the obligation under the lease. 17 Comp. Gen. 739 (1938). More often, however, the cost of alterations will be the government's responsibility. A clause GSA uses to give the government the right to make alterations during the course of the lease is found at 48 C.F.R. § 552.270-19. The clause addresses alterations and should not be used to assume the cost of items which are more properly classed as repairs which are the lessor's responsibility. 1 Comp. Gen. 723 (1922). Conversely, alterations are not an obligation of the lessor under the "good repair" clause. 39 Comp. Gen. 304, 307 (1959).

Alterations which are the responsibility of the General Services Administration are financed from the Federal Buildings Fund, a revolving fund established by 40 U.S.C. § 490(f). See 41 C.F.R. § 101-21.501. Money in the Fund is available as and to the extent specified in annual appropriation acts. 40 U.S.C. § 490(f)(2). The Federal Buildings Fund appropriation typically includes several distinct line items, two of which are "repairs and alterations" and "rental of space." See, e.g., the Treasury, Postal Service, and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430, 451 (1999). Lump-sum payments for initial space alterations, whether done by the landlord or some other contractor, are payable from the "repairs and alterations" appropriation; alterations made by the landlord and amortized over the life of the lease are payable from the "rental of space" appropriation. B-95136, August 8, 1979. In addition, as with GSA's leasing operations in general, 40 U.S.C. § 304c exists as backup authority for GSA to charge the cost of alterations to the tenant agency. See B-141560, January 15, 1960.

Major alteration projects require congressional approval under 40 U.S.C. § 606(a). When this provision was originally enacted as part of the Public Buildings Act of 1959, it applied to alterations to government-owned buildings but not to leased buildings. 65 Comp. Gen. 722 (1986). Congress amended section 606(a) in the Public Buildings Amendments of 1988 to add the following requirement:

"No appropriation shall be made to alter any building, or part thereof, which is under lease by the United States for use for a public purpose if the cost of such alteration would exceed $750,000 unless such alteration has been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on [Transportation and Infrastructure] of the House of Representatives." Pub. L. No. 100-678, § 3(a), 102 Stat. 4049 (1988).

Approval is secured by submitting a prospectus to the appropriate committees.[77]

Alterations within the general scope of the lease will normally be acquired through a modification to the lease. Beyond-scope alterations may be acquired through a separate contract, a supplemental lease agreement, or by having the work performed by government employees. 48 C.F.R. § 570.601. As noted earlier, if the lease is within GSA's responsibility, the tenant agency has no authority to modify the lease without prior authorization from GSA. 38 Comp. Gen. 803, 805 (1959). Where the tenant agency violates this principle, it may nevertheless be possible to pay for the alterations on a quantum meruit basis. See B-155200-O.M., November 24, 1964. GSA's current procedures for obtaining reimbursable space alterations are contained in 41 C.F.R. §§ 101-20.106-1, 101-20.106-2.

f. Rental in District of Columbia

Originally enacted in 1877 (19 Stat. 370), 40 U.S.C. § 34 provides:

"No contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or any part of building."

Early decisions viewed this provision as "too plain to need interpretation." 4 Comp. Dec. 139, 141 (1897). See also 9 Comp. Dec. 551, 552 (1903). The accounting officers and the Attorney General uniformly held in holding that space rentals in the District of Columbia without explicit statutory authority were illegal.[78]

The enactment of the Federal Property and Administrative Services Act in 1949 considerably diminished the impact of 40 U.S.C. § 34. GAO commented as follows in B-159633, May 20, 1974:

[77] See Public Buildings Act heading for further detail.

[78] E.g., 2 Comp. Gen. 722 (1923); 2 Comp. Gen. 214 (1922); 26 Comp. Dec. 155 (1919); 17 Op. Att'y Gen. 87 (1881); 15 Op. Att'y Gen. 274 (1877).

"[T]he Federal Property and Administrative Services Act of 1949 . . . authorizes GSA to enter into leasing agreements for the benefit and accommodation of Federal agencies. . . . We consider the language of [40 U.S.C. § 490(h)] together with its legislative history as authorizing the Administrator of GSA to lease buildings and parts of buildings in the District of Columbia . . . . [I]f the Administrator of GSA had authorized the formation of this rental agreement, the statutory requirement of 40 U.S.C. § 34 . . . would have been satisfied."[79]

Thus, the rule has developed that 40 U.S.C. § 34 is satisfied where GSA arranges for the space under authority of the Federal Property and Administrative Services Act or delegates the authority to the renting agency. Id. See also 56 Comp. Gen. 572 (1977); B-114827, October 2, 1974; B-159633, September 10, 1974; B-157512-O.M., September 1, 1972.

GSA's Federal Property Management Regulations, issued under authority of the Federal Property and Administrative Services Act, provide the basis for another significant clarification. Earlier decisions had construed 40 U.S.C. § 34 as a comprehensive ban applicable to all space rentals for government use, no matter how temporary, and therefore fully applicable to the rental of short-term meeting or conference facilities. E.g., 46 Comp. Gen. 379 (1966); 35 Comp. Gen. 314 (1955);[80] 11 Comp. Dec. 678 (1905). GSA subsequently issued a regulation, now found at 41 C.F.R. § 101-17.101-4, which treats the procurement of short-term conference facilities as a service contract rather than a rental contract. GAO considered this regulation in 54 Comp. Gen. 1055 (1975) and, based on it, modified the prior decisions. "Federal agencies may now procure the short-term use of conference and meeting facilities [without regard to 40 U.S.C. § 34] providing they comply with the requirement of [the GSA regulations]." Id. at 1058.

[79]B-159633 was overruled in part by 54 Comp. Gen. 1055 (1975), but the partial overruling involves a separate issue and has no effect on the point discussed in the text.

[80]This case illustrates what used to be a somewhat bizarre, although probably intended, consequence of 40 U.S.C. § 34. The statute had been construed as applicable to the District of Columbia government. See also 34 Comp. Gen. 593 (1955); 17 Comp. Gen. 424 (1937); 10 Comp. Dec. 117 (1903). Therefore, prior to home rule, the government of the District of Columbia could not rent space in the District of Columbia without specific congressional authorization.

For situations not governed by the Federal Property and Administrative Services Act, or where an agency subject to the Act attempts to contract directly rather than through or under delegation from GSA, 40 U.S.C. § 34 remains in force. Payment in violation of the statute can put a certifying officer at risk. See 46 Comp. Gen. 135 (1966). Many of the earlier interpretations, therefore, are still valid although they now apply to a smaller universe.

The first point to note is that the statute is expressly limited to rentals in the District of Columbia. It has no effect on, nor is there any similar restriction to, rentals elsewhere, even a few minutes away in the suburbs of Maryland or Virginia. B-140744, October 1, 1959; B-204730-O.M., July 26, 1982. It applies to all space rentals for governmental purposes. This includes space for storage. 6 Comp. Gen. 685 (1927); 27 Op. Att'y Gen. 270 (1909). Although, as noted above, it is no longer regarded as applicable to short-term conference facilities, the "service contract" concept cannot be extended to include lodging accommodations, which remain subject to 40 U.S.C. § 34. 56 Comp. Gen. 572 (1977).

The statute requires an appropriation "in terms." This means "express provision for the rent of a building, or language equivalent thereto." 10 Comp. Dec. 178, 180 (1903). Obviously, express language in an appropriation act authorizing renting or leasing in the District of Columbia will do the job. E.g., 13 Comp. Dec. 644 (1907). Just as clearly, burying the item in budget justification materials is not sufficient. 46 Comp. Gen. 379, 381 (1966). In 9 Comp. Dec. 831 (1903), an appropriation for "every other necessary expense" in connection with the storage of certain records was, given the context of the appropriation, viewed as sufficiently specific. However, 11 Comp. Dec. 678 (1905) reached the opposite result where similar language was used in a context which did not clearly imply the need for space acquisition. The requisite authority need not be in an appropriation act. It may be contained in the agency's enabling or program legislation. 23 Comp. Gen. 859 (1944). For example, the Federal Emergency Management Agency's authority to lease property "wherever situated" is sufficient. B-195260, July 11, 1979.

An interesting "common sense" exception occurred in 6 Comp. Dec. 75 (1899). The building which housed the Department of

Justice had become "unsafe, overcrowded, and dangerously overloaded." Congress made an appropriation to construct a new building on the site of the old building, but there was no mention of interim facilities. Reasoning that rental of temporary quarters was "absolutely necessary" to fulfilling the purpose of the appropriation, and that Congress could not possibly have intended for the Department to cease operations during the construction period, the Comptroller of the Treasury held that the construction appropriation was available for the rental of temporary quarters while the new building was being erected. "This statute [40 U.S.C. § 34] will well be fulfilled by any appropriation for a purpose which necessarily implies renting a building." Id. at 78-79. However, as the Comptroller explained a few years later, the necessary implication theory requires more than mere inconvenience. A rigid interpretation in 6 Comp. Dec. 75 "would have put the Department of Justice, with its records, in the street." 9 Comp. Dec. 551, 552 (1903). A similar holding is Rives v. United States, 28 Ct. Cl. 249 (1893), finding 40 U.S.C. § 34 inapplicable where the Public Printer purchased certain material under statutory direction but, having insufficient storage space available, simply left it where it was until more space could be obtained.

The statute similarly does not apply in situations which amount to inverse condemnations. Semmes and Barbour v. United States, 26 Ct. Cl. 119 (1891) (government continued to occupy property after expiration of lease).

An agency may not avoid 40 U.S.C. § 34 by entering into a cost reimbursement contract with someone else to procure space that it could not do by a direct leasing arrangement. 49 Comp. Gen. 305, 308 (1969). This is nothing more than an application of the fundamental tenet that an agency may not do indirectly that which it is prohibited from doing directly. However, GAO advised the National Science Foundation in 46 Comp. Gen. 379 (1966) that it could use donated funds, without regard to 40 U.S.C. § 34, as long as the rental was in furtherance of an authorized agency purpose.

A related statute is 40 U.S.C. § 35:

"Where buildings are rented for public use in the District of Columbia, the executive departments are authorized, whenever it shall be advantageous to the public interest, to rent others in their stead: Provided, That, except as otherwise provided, no increase in the number of buildings in use, nor in the amounts paid for rents, shall result therefrom."

Our research has disclosed no cases interpreting or applying this provision.

g. Economy Act

It is necessary to make brief mention of a statute which no longer exists because it is found in virtually every case involving a government lease for a period of over 50 years. Section 322 of the Economy Act of 1932, codified prior to 1988 at 40 U.S.C. § 278a, prohibited the obligation or expenditure of appropriated funds (1) for rent in excess of 15 percent of the fair market value of the rented premises as of the date of the lease,[81] and (2) for repairs, alterations, or improvements to the rented premises in excess of 25 percent of the first year's rent.[82]

This statute generated literally dozens of decisions. The 15 percent limitation, the General Services Administration Board of Contract Appeals stated in a 1984 case, "is a blunt instrument at best, . . . is totally out of harmony with the economic situation" of the times, and had become "a fruitful source of litigation in its own right." Northwestern Development Co., GSBCA Nos. 6821, 7433, 84-3 B.C.A. ¶ 17,613 (1984), at 87,749. The 25 percent limitation for alterations and repairs, GAO reported in 1978, was ineffective and should be repealed. General Services Administration's Practices for Altering Leased Buildings Should Be Improved, GAO/LCD-78-338, 19-22 (September 14, 1978).

The demise of section 322 came about in somewhat byzantine fashion. In a series of continuing resolutions, Congress suspended the 15 percent limitation for fiscal year 1982, renewed the suspension for the following year, made it permanent in 1984, and confirmed the permanency of the suspension in 1987. See Ralden Partnership v. United States, 891 F.2d 1575, 1576-77 and 1579 n.5 (Fed. Cir. 1989); 65 Comp. Gen. 302 (1986). Then, in 1988, section 322 was repealed outright. Public Buildings Amendments

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[81] E.g., 57 Comp. Gen. 591 (1978); 21 Comp. Gen. 906 (1942); 12 Comp. Gen. 546 (1933); 12 Comp. Gen. 440 (1932).

[82] E.g., 30 Comp. Gen. 122 (1950); 30 Comp. Gen. 58 (1950); 29 Comp. Gen. 279 (1949); 20 Comp. Gen. 30 (1940).

of 1988, Pub. L. No. 100-678, § 7, 102 Stat. 4049, 4052. Virtually every pre-1988 leasing case cited throughout this discussion includes at least some mention of the Economy Act, and while those cases remain valid for the propositions for which they are cited, the portions dealing with Economy Act issues are now obsolete.

h. Some Agency-Specific Authorities

The General Services Administration does the major portion of the government's space leasing, but it does not do all of it. A number of other agencies have their own statutory leasing authority, either agencywide or in specific contexts. We note here a sampling of those authorities.

The defense establishment has several provisions. The Secretary of Defense and the Secretary of each military department may provide for "[t]he leasing of buildings and facilities." 10 U.S.C. § 2661(b)(1). Another provision gives the military departments authority to "acquire any interest in land" that does not cost more than $200,000 exclusive of administrative costs and the amounts of any deficiency judgments. 10 U.S.C. § 2672(a). Before entering into a lease of real property in the United States whose estimated annual rental is more than $200,000, military departments must report the transaction to the Senate and House Armed Services Committees and allow a 30-day waiting period. 10 U.S.C. § 2662(a)(2).

Other provisions address military leases overseas. The military departments are authorized by 10 U.S.C. § 2675 to lease real property in foreign countries that is "needed for military purposes other than for military family housing," and by 10 U.S.C. § 2828(c) to lease housing facilities in foreign countries in specified circumstances. Both sections authorize multi-year leases—up to 5 years under section 2675 and up to 10 years under section 2828(c)—and permit the leases to be obligated year-by-year against annual appropriations. 10 U.S.C. §§ 2675, 2828(d). Appropriations available for "maintenance or construction" may be used for leases under sections 2672 or 2675. 10 U.S.C. § 2673.

Some examples from the civilian side of the government are:

- 15 U.S.C. § 78d(b)(2): Securities and Exchange Commission "is authorized to enter directly into leases for real property" and is exempt from GSA's space management regulations.

- 15 U.S.C. § 2218(b)(3): Federal Emergency Management Agency may lease any property or interest in property "wherever situated" needed for activities under the Federal Fire Prevention and Control Act.
- 22 U.S.C. § 2514(d)(9): Funds available to the Peace Corps may be used for leases abroad not to exceed 5 years.
- 22 U.S.C. § 2670(h): State Department may lease, for terms of up to 10 years, real property in foreign countries for the use of the Foreign Service.
- 38 U.S.C. § 8122(b): Department of Veterans Affairs may lease "necessary space for administrative purposes" in connection with "extending benefits to veterans and dependents."
- 39 U.S.C. § 401(6): general leasing authority for United States Postal Service.
- 42 U.S.C. § 7256(a): general leasing authority for the Department of Energy.

3. Foreign Leases

Because of differences in law and custom, leases of real property in foreign countries often present problems not found in domestic leases. The first point to emphasize is that the fiscal laws of the United States apply in full force just as they apply to domestic leases. An agency may not disregard the fiscal laws just because the money is being spent in a foreign country.

One example is the Antideficiency Act. As just noted in the preceding section, agencies with significant presence in foreign countries (military departments, State Department, Peace Corps) have been given specific authority to enter into multi-year leases of real property. Absent such authority, leasing activities are subject to the rule that leases are construed as binding only to the end of the fiscal year in which made or to the end of the period of any available no-year or multi-year authority, and require affirmative renewal by the government to extend beyond that point. 5 Comp. Gen. 355 (1925); A-91697, March 3, 1938.

Rental escalation clauses purporting to obligate the United States to indeterminate or indefinite liability, or which may cause the rent to exceed a statutory ceiling (see, e.g., 10 U.S.C. § 2828(e)), have also been found to violate the Antideficiency Act. Leased Military Housing Costs in Europe Can Be Reduced by Improving Acquisition Practices and Using Purchase Contracts, GAO/NSIAD-85-113, 7-8

(July 24, 1985). In one such case involving a lease in Italy which did not contain a termination clause, the Navy unilaterally modified the lease so as to keep the rent within the statutory ceiling. GAO advised that if the landlord were able to recover by lawsuit, the amount of any judgment or settlement would not be added to the rent payments for purposes of assessing Antideficiency Act violations. B-227527/B-227325, October 21, 1987.

In a 1986 case, the Air Force was having difficulty inserting in a German lease a provision limiting expenditures to the statutory ceiling. In that case, however, since bona fide cost estimates were well within the ceiling, the rent itself was fixed, the only exposure to escalation being maintenance and utility charges, and the lease included a termination for convenience clause, Antideficiency Act considerations did not impede entering into the lease. 66 Comp. Gen. 176 (1986).

Another fiscal statute which rears its head in the foreign lease context is 31 U.S.C. § 3324(b), which prohibits advance payments unless specifically authorized. The same agencies with multi-year leasing authority generally also have authority to pay rent in advance. 10 U.S.C. § 2396(a) (military departments); 22 U.S.C. § 2514(d)(9) (Peace Corps); 22 U.S.C. § 2670(h) (State Department). Absent such authority, rent could not be paid in advance. 19 Comp. Gen. 758 (1940); 3 Comp. Gen. 542 (1924). The authority for the military departments applies only in accordance with local custom. See B-194353, June 14, 1979. The rental of a grave site in perpetuity, in apparent accord with local custom, is not regarded as an advance payment. 11 Comp. Gen. 498 (1932).

The standards for recording obligations, as prescribed by 31 U.S.C. § 1501(a), are the same for foreign leases. See B-192282, April 18, 1979, described more fully in Chapter 7, for an unusual application based on custom in South Korea. The same is true for the Assignment of Claims Act. E.g., 11 Comp. Gen. 278 (1932) (illustrating the point that the United States can choose to recognize an assignment); 10 Comp. Gen. 31 (1930) (rent can be paid to agent bank in United States if specified in lease).

To restate the point, a government agency entering into a lease of real property in a foreign country must adhere to the statutes governing the obligation and expenditure of public funds; deviations require legislative authorization. When it comes to determining rights and liabilities under the lease, however, the situation is somewhat different. Rights and liabilities are governed by the laws of the place where the premises are located and the lease was executed. B-120286, July 12, 1954. As that decision pointed out, the considerations which subordinate state law to federal law in the case of a domestic lease do not apply to a foreign lease.

In B-120286, to illustrate, the government of the Netherlands passed a law permitting all landlords to raise rents up to a specified percentage. The question was whether it was appropriate for a federal agency, as tenant under a lease in the Netherlands, to pay the lessor's demand for the increased rent. If the landlord sued, he would sue in a Dutch court which would apply Dutch law and award the rent increase. Therefore, GAO advised that the voucher should be paid. Applying the same rule in a 1957 case, GAO allowed the claim of a Greek landlord for half the fire insurance premium on property leased in Athens. B-132152-O.M., June 13, 1957.

In 3 Comp. Gen. 864 (1924), GAO applied the law of the Province of Quebec to construe the repair clause in a lease of space in Montreal. Under provincial law, repairing an interior wall was a "tenant's repair" unless otherwise specified in the lease. A similar case is 16 Comp. Gen. 639 (1937), using Dutch law to allocate repair responsibilities under a lease of property in The Hague.

Currency fluctuations are another source of problems. The lease will specify whether payment is to be made in U.S. dollars or in foreign currency. In a 1946 case, a lease in China stipulated payment in yuan. Extreme inflation in China following World War II so devaluated the yuan that the monthly rental was worth approximately $2, under which the landlord could not meet his repair and maintenance responsibilities. The State Department wanted to amend the lease to provide for payment in U.S. dollars equivalent to the amount originally bargained for. Concluding that Chinese law would almost certainly grant the landlord equitable relief, GAO concurred with the proposal, as long as sufficient appropriations were available for the increased rent. B-55649, February 19, 1946.

The extreme case occurred in B-189121, November 30, 1977, recons. denied, B-189121, April 15, 1983. A lease in former Cambodia provided for payment in Cambodian riels. For reasons not apparent, the landlord failed or refused to collect the rent checks when they were tendered. By the time the landlord filed a claim, the riel had been abolished and was worthless and there was no basis to direct payment in U.S. dollars.

Providing for payment in U.S. dollars does not guarantee a claim-free existence. In B-185960, August 19, 1976, an Italian landlord claimed additional rent, alleging financial loss resulting from devaluation of the dollar. Devaluation per se, as a sovereign act, could not form the basis of relief. However, the claimant also cited a provision of the Italian Civil Code, the application of which to leases was not clear. GAO advised the agency in that case, the Navy, that it could pay the claim if it determined that the provision of Italian law could be applied. The Armed Services Board of Contract Appeals denied a similar claim in Alka, S.A., ASBCA No. 38005, 91-3 B.C.A. ¶ 24,107 (1991), involving a lease in Athens, Greece, which specified that it would be governed by the laws of the United States, under which the lessor had to bear the risk.

If foreign law is to be considered and applied, the claimant has the burden of "proving" what that law is. It is not the responsibility of the adjudicating tribunal to chase it down. B-189121, April 15, 1983.

4. Lease-Purchase Transactions

In the context of government real property, the term "lease-purchase" refers to a transaction in which a building is constructed to government specifications and then leased to the government under a long-term lease during which construction costs are amortized, at the end of which time title passes to the United States. Lease-purchases are also known as "purchase contracts." Putting things in budgetary perspective, a Senate committee made the following observation in connection with 1954 lease-purchase legislation:

> "It should be made clear that there are generally three methods available for providing space for the permanent activities of the Federal Government. These are (1) by direct construction with appropriated funds, (2) by lease-purchase contracts with annual payments applied to the amortization of the initial cost over a period of years at the end of which title to the property would pass to the United States, and (3) by straight annual or term leasing under which no capital equity would accrue to the Government. Of these three methods, the overall cost of the first would be the

lowest, the second would be the next lowest in cost, and the third would be the most costly method."[83]

A variation is "lease-construction," which is similar to lease-purchase except that, at the end of the lease, title does not pass to the government. Lease-construction is the most expensive method of all.[84]

The reason the government resorts to lease-purchase or lease-construction arrangements is the same reason we noted earlier that the government often leases space when ownership would be more cost-effective: budgetary constraints. As far back as the 1954 Purchase Contract Act, the Senate Public Works Committee, after making the observation quoted above, was forced to say that "no reliable forecast can be made of the time when budgetary considerations would permit the appropriation of the huge sums required to meet these space needs by direct construction."[85] Thus, while Congress has repeatedly resorted to lease-purchase over the second half of the 20th century, it has done so with ambivalence.

The first major lease-purchase program was the Public Buildings Purchase Contract Act of 1954, 68 Stat. 518, 40 U.S.C. § 356—seemingly temporary, stopgap legislation designed to meet the needs of an expanding government in the post-World War II era. The legislation authorized the General Services Administration to enter into lease-purchase contracts with terms of at least 10 but not more than 25 years, with title to the property to vest in the United States not later than the expiration of the contract term. 40 U.S.C. § 356(a). The "temporary" nature of this legislation was revealed by a limitation that "no appropriations shall be made" for lease-purchase contracts not congressionally approved within three years of the legislation's enactment. Section 411(e) of the Public Buildings

[83]S. Rep. No. 83-1084, at 2 (1954), reprinted in 1954 U.S.C.C.A.N. 2637, 2638. This is the report of the Senate Committee on Public Works on what became the Public Buildings Purchase Contract Act of 1954.

[84]See H.R. Rep. No. 87-2050, at 13 (1962), quoted in Merriam v. Kunzig, 476 F.2d 1233, 1237 n.3 (3d Cir. 1973), and in 51 Comp. Gen. 573, 575 (1972). This is the report of the House Committee on Appropriations on the Independent Offices Appropriation Act for 1963.

[85]S. Rep. No. 83-1084, supra note 83, at 2.

Purchase Contract Act, as added by section 101, 68 Stat. 519. (We will return to subsection (e) below.) The contracts were to provide for equal annual payments to amortize principal and interest, not to exceed limitations specified in appropriation acts. Id. GSA's practice under this legislation was to first enter into contracts for site acquisition and preparation of plans and specifications, and then enter into either a single three-party contract (government, builder, investor) or separate construction and financing contracts. See B-144680, November 7, 1961; B-130934, June 26, 1957.

Several aspects of the 1954 legislation became prototypes for future lease-purchase programs, and many of the decisions therefore remain valid. One provision of the law directed reimbursement to the contractor of certain expenses, including "costs of carrying appropriate insurance." 40 U.S.C. § 356(d)(3). This does not authorize the government to insure the property in its own right, or to require the contractor to carry insurance for the government's protection. 35 Comp. Gen. 391 (1956). An important element of the program is 40 U.S.C. § 356(h), providing for the property to remain on state and local tax rolls until title passes to the government. The statute does not expressly authorize the government to recover improperly assessed state or local taxes, but the government has this right without the need for statutory authority. United States v. Dekalb County, 729 F.2d 738 (11th Cir. 1984).

As noted above, subsection (e) of the 1954 law (68 Stat. 519), required prospectus approval by congressional oversight committees as a prerequisite to the appropriation of funds. If actual costs exceeded the approved estimate, GAO had advised that there was no need to go back to the committees as long as the variation was "reasonable." 37 Comp. Gen. 613 (1958); B-129326, October 5, 1956. Of course, what is "reasonable" requires a case-by-case evaluation. In 37 Comp. Gen. 613, for example, GAO did not regard a 15 percent increase in construction costs as a "reasonable variation." As also noted above, subsection (e) limited the time for prospectus approval to 3 years after the date of enactment (July 22, 1954). Congressional discomfort with the program is also evident in another provision of the 1954 law, 40 U.S.C. § 357, stating the congressional intent that the program not "constitute a substitute for or a replacement of any program for the construction by the United States of such structures as may be required from time to time by the Federal Government."

When the 3-year period elapsed, Congress declined to renew the program.[86] In considering what was to become the Independent Offices Appropriation Act of 1959, the House Appropriations Committee cited a GAO study which found that "it costs at least $1.64 under lease-purchase to buy the same amount of building as $1.00 does by direct appropriation." H.R. Rep. No. 85-1543, at 3 (1958). Consequently, that act included a permanent prohibition on the use of funds "in this or any other Act . . . for payment for sites, planning or construction of any buildings by lease-purchase contracts." Pub. L. No. 85-844, 72 Stat. 1063, 1067 (1958). Public Law 85-844 exempted 29 projects started or planned under the 1954 law and authorized one new project. See B-160929, April 20, 1967.

The prohibition did not, and of course could not, prevent legislating the occasional exception. E.g., B-139524, June 1, 1959. It also did not prevent GSA from soliciting bids on alternate bases, one of which was lease with option to purchase. 38 Comp. Gen. 703 (1959). GSA had found in that case that, without the purchase option, bidders were amortizing construction costs over the first few years of the proposed lease term, so that the government would be paying those costs in any event. In addition, the military departments asserted the authority to use lease-purchase under what is now 10 U.S.C. § 2663(c), which authorizes them to "contract for or buy any interest in land" needed for specified purposes. GAO agreed, especially for projects which had been reported to Congress under 10 U.S.C. § 2662. B-154420-O.M., July 7, 1964.

The prohibition of the Independent Offices Appropriation Act of 1959 applied by its terms to "lease-purchase." It therefore did not touch "lease-construction" which, as we have noted, is even more costly to the taxpayer. Congress filled this gap by enacting an appropriation rider for 9 consecutive years starting with 1963, which prohibited the use of funds for lease-construction projects whose estimated cost exceeded $200,000 without prospectus approval by the appropriate congressional committees. The provision is quoted in full in several decisions, e.g., 45 Comp. Gen. 27, 29 (1965) and 44 Comp. Gen. 491, 492 (1965). Even though it was one of GSA's

[86]Subsection(e) has been dropped from the U.S. Code as fully executed. Nevertheless, the limitation continues to apply (see 40 U.S.C. § 356 note), subject, of course, to explicit legislative exceptions, as discussed in the text.

general provisions, it applied to all agencies funded under the act in which it appeared. 44 Comp. Gen. 491 (1965). It was not governmentwide, however.

The prohibition was not limited to "total or substantially total occupancy" by the government but applied as well to shared occupancy situations. 45 Comp. Gen. 27 (1965). However, the fact that an offered building was not actually in existence was not, in and of itself, sufficient to invoke the prohibition. The prohibition was regarded as inapplicable if there was a "bona fide intention on the part of the offeror to construct the building offered for lease irrespective of its securing a lease with GSA," 51 Comp. Gen. 573, 576 (1972), or if it was clear that the offeror was acting at its own risk with no promise or commitment by the government to lease the space, 45 Comp. Gen. 506 (1966).

The last such prohibition appeared in the Independent Offices Appropriation Act for 1971, Pub. L. No. 91-556, 84 Stat. 1442, 1449 (1970). Two years later, Congress amended 40 U.S.C. § 606 to add the prospectus approval requirement for leases discussed previously in this section. This evolution is described in Merriam v. Kunzig, 476 F.2d 1233, 1237-39 (3d Cir. 1973), cert. denied, sub nom. Gateway Center Corp. v. Meriam, 414 U.S. 911 (1973).

In considering the 1972 public buildings legislation, Congress faced the same problem it had faced in 1954—a backlog of needed federal construction with no foreseeable prospects of being able to appropriate the necessary amounts. Therefore, it again turned to the "stop-gap expedient"[87] of lease-purchase and enacted section 5 of the Public Buildings Amendments of 1972, 40 U.S.C. § 602a. The 1972 law authorized GSA to enter into lease-purchase contracts with up to 30-year terms, with title to the property to vest in the United States at or before the expiration of the contract term. 40 U.S.C. § 602a(a).

Many of the 1972 provisions were patterned after the 1954 Purchase Contract Act. Payments to the contractor include reimbursement for "costs of carrying appropriate insurance," and the property is to

[87]H.R. Rep. No. 92-989, (1972), reprinted in 1972 U.S.C.C.A.N. 2370, 2373 (report of the House Committee on Public Works).

remain on state and local tax rolls until title passes to the United States. 40 U.S.C. §§ 602a(b)(3), 602a(d). Also similar to the 1954 law, the 1972 act gave GSA a 3-year time limit on entering into the contracts. 40 U.S.C. § 602a(g). Projects were subject to the prospectus approval requirements of 40 U.S.C. § 606(a). 40 U.S.C. § 602a(f).

GSA devised what it called a "dual system" of contracting to implement 40 U.S.C. § 602a. GSA would enter into either a single contract or a series of phased contracts for construction of each project. GSA would then enter into a financing contract for a group of projects with a "trustee," who would obtain the necessary funds by selling "Participation Certificates" to private investors. GAO concurred that this scheme was within GSA's authority under section 602a. 52 Comp. Gen. 517 (1973); 52 Comp. Gen. 226 (1972). GAO also agreed that the statutory 3-year cutoff (June 30, 1975) did not apply to revisions of projects whose basic purchase contract had been entered into prior to the cutoff, as long as the modification did not result in so substantial a change in the project from the one originally approved as to amount to a "new" project. B-177610, April 26, 1976.

GSA has considered refinancing purchase contracts entered into under 40 U.S.C. § 602a by paying off the existing debt with funds obtained from the Federal Financing Bank. Since the refinancing would not involve any other project modifications, GAO found the proposal legally unobjectionable. B-250236, September 9, 1992.

Although the authority of 40 U.S.C. § 602a, like its 1954 predecessor, is now closed to the initiation of new projects, lease-purchase activity goes on under a variety of other authorities. Congress can always legislate new projects, and has done so in a number of instances. Some examples are:

- Section 103 of the Energy and Water Development Appropriation Act, 1984, Pub. L. No. 98-50, 97 Stat. 247, 249 (1983), authorized the Army Corps of Engineers to use lease-purchase to acquire an office building in New Orleans, Louisiana. GAO summarized some of the financial aspects in Lease-Purchase: Corps of Engineers Acquisition of Building in New Orleans District, GAO/AFMD-88-56FS (June 1988).

- The 1988 continuing resolution, Pub. L. No. 100-202, 101 Stat. 1329 (1987), authorized several lease-purchase projects. See 101 Stat. at 1329-405 through 1329-407.
- Another 1987 statute, the Federal Triangle Development Act, 40 U.S.C. §§ 1101-1109, authorizes development of a federal building complex in Washington, D.C., using lease-purchase, with planning and construction under the supervision of the Pennsylvania Avenue Development Corporation. Financing, discussed in B-248647.2, April 24, 1995, and B-248647, December 28, 1992, is being provided by the Federal Financing Bank.
- Legislation enacted in 1989 authorizes the Department of Veterans Affairs to use lease-purchase to provide for the collocation of certain regional offices with medical centers (38 U.S.C. § 316) and to acquire up to three medical facilities (38 U.S.C. § 8103(d)). Both provisions require that obligations be "subject to the availability of appropriations for that purpose," and therefore do not constitute contract authority. B-239435, August 24, 1990.

GSA's authority is now found in 40 U.S.C. §§ 490(h) and 490d, in conjunction with the prospectus approval requirement of 40 U.S.C. § 606(a). Subsection 490(h)(1), GSA's general leasing authority in the Federal Property and Administrative Services Act, authorizes leases of up to 20 years "in buildings and improvements which are in existence or to be erected by the lessor for such purposes." This provision, although the result is probably not what Congress had in mind (see 38 Comp. Gen. 703 (1959)), has been regarded as sufficient authority for lease-purchase or lease-construction arrangements, and was in fact used during the time period between the 1954 and 1972 programs. E.g., 38 Comp. Gen. 703; B-166868, July 15, 1969; B-157423-O.M., September 14, 1965; B-156917-O.M., June 24, 1965.

Section 490d, which first made its appearance as section 6 of 5101(m) of the 1987 continuing resolution, Pub. L. No. 99-500, 100 Stat. 1783-321, provides:

> "Funds hereafter made available to the General Services Administration for the payment of rent shall be available for the purpose of leasing, for periods not to exceed thirty years, space in buildings erected on land owned by the United States."

This reflects a continuation of the long-standing policy of the Congress that "no public building shall be erected on land not owned by the United States." 6 Comp. Dec. 877, 878 (1900).

An aspect of lease-purchase financing that produced controversy in the 1990s is scorekeeping. Scorekeeping may be defined as "the process of tracking the status and fiscal impact of congressional budgetary actions." B-239435, August 24, 1990. See also A Glossary of Terms Used in the Federal Budget Process (Exposure Draft), GAO/AFMD-2.1.1 at 71-72 (January 1993). It is necessary in order to comply with various aspects of the Congressional Budget Act. The problems are discussed in Budget Issues: Budget Scorekeeping for Acquisition of Federal Buildings, GAO/T-AIMD-94-189 (September 20, 1994), and The Budget for Fiscal Year 1991: Scoring of GSA Lease-Purchases, GAO/AFMD-91-44 (January 1991). The scorekeeping issue is largely another facet of the budgetary concerns to which we have alluded throughout this discussion.

Prior to 1991, lease-purchase was scored the same as a straight lease—spread over the period of the lease, one year's budget authority at a time. This produced a budgetary bias in favor of the more expensive lease-purchase option. Scoring rules were changed in 1990 to require scoring the full costs of a lease-purchase up front. While this had the benefit of "eliminating the artificial advantage previously given to lease-purchases," it introduced a new bias in favor of operating leases, still scored one year at a time. T-AIMD-94-189, supra, at 3.

The 1999 edition of Office of Management and Budget Circular No. A-11 addresses the scoring of lease-purchases in some detail. It provides that, for scorekeeping purposes:

> "The up-front budget authority required [in the year in which the authority is first made available] for both lease-purchases and capital leases . . . equals the present value of the minimum lease payments excluding payments for identifiable annual operating expenses . . . discounted . . . using the appropriate interest rate. . . . Additional budget authority equal to Treasury's cost of financing plus any annual operating expenses will be recorded on an annual basis over the lease term." OMB Cir. No. A-11, App. B. para 2(b).[88]

However, 40 U.S.C. § 490e provides:

[88]OMB's instructions for reporting obligations say essentially the same thing. OMB Cir. No. A-34, sec. 11(e) (1999).

"Notwithstanding any provisions of this Act or any other Act in any fiscal year, obligations of funds for lease, entered into in accordance with section 490(h)(1) of this title [section 210(h)(1) of the Federal Property and Administrative Services Act of 1949, as amended], shall be limited to the current fiscal year for which payments are due without regard to [the Antideficiency Act, 31 U.S.C. § 1341].

F. Public Buildings and Improvements

1. Construction

a. General Funding Provisions

(1) 41 U.S.C. § 12

Originally enacted in 1868 (15 Stat. 177), 41 U.S.C. § 12 provides:

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

This is one of the permanent funding statutes through which Congress implements its control of the public purse, and has often been cited in tandem with other funding statutes such as the purpose statute (31 U.S.C. § 1301(a)) or the Antideficiency Act (31 U.S.C. § 1341). E.g., 42 Comp. Gen. 226, 227 (1962); 41 Comp. Gen. 255, 257-58 (1961); 21 Op. Att'y Gen. 244, 247-48 (1895). Its purpose, as with the other funding statutes, is to prevent the executive from creating obligations beyond those contemplated and authorized by Congress. 38 Comp. Gen. 758, 761 (1959), citing 21 Op. Att'y Gen. at 248. A contractor who does work in excess of the amount appropriated can recover only up to the limit of the appropriation, even though the "over obligation" may have been induced by government error. Sutton v. United States, 256 U.S. 575 (1921).

In addition, a government officer or employee who knowingly acts in a way that would violate 41 U.S.C. § 12 "shall be fined under this title or imprisoned [not more than a year]," or both. 18 U.S.C. § 435 (enacted as part of the same 1868 legislation as 41 U.S.C. § 12).[89]

For construction within the District of Columbia, 41 U.S.C. § 12 is reinforced by another statute, 40 U.S.C. § 68, which provides that "there shall not be erected on any reservation, park, or public grounds, of the United States within the District of Columbia, any building or structure without express authority of Congress." While 41 U.S.C. § 12 has spawned numerous decisions, one finds little mention of 40 U.S.C. § 68 apart from the occasional passing reference such as 20 Comp. Gen. 272, 275 (1940).

Much ink has been spilled trying to decide just what is or is not a "public building" for purposes of 41 U.S.C. § 12. GAO has never attempted a precise definition, but has used more of what one might call a "we know one when we see one" approach. Not that difficult, one decision suggested. "[T]he term 'building' . . . instantly calls to mind a structure of some kind having walls and a roof." 45 Comp. Gen. 525, 526 (1966). See also B-119846, July 23, 1954 ("structure of brick enclosing a space within its walls and covered with a roof," which "any average person" would recognize as a building); B-165289-O.M., August 26, 1969 (structure with a foundation, walls, separate rooms, and a roof fits the ordinary meaning of the term).[90] Clearly, the statute applies to public buildings which are more or less permanent, the term "permanent" referring not so much to the mode of construction as to contemplated use. Thus, the following have been treated as "public buildings" for purposes of 41 U.S.C. § 12:

- Industrial type building with railroad siding for hydrostatic testing, painting, and maintaining specially designed tank cars used for transporting helium. 38 Comp. Gen. 392 (1958).

[89]The revision notes for this section state that penalties for such violations were reduced many years ago to avoid having to classify the offender as a felon. 18 U.S.C. § 435 note. Nevertheless, inflation being what it is, the fine for a violation of this provision (a "class A misdemeanor") now can be up to $100,000. 18 U.S.C. §§ 3559(a)(6), 3571(b)(5).

[90]Such wisdom is not the exclusive province of the General Accounting Office. E.g., In re Amber S., 39 Cal. Rptr. 2d 672 (Cal. Ct. App. 1995) (building for purposes of state burglary statute is "any structure which has walls on all sides and is covered by a roof").

- Quonset hut attached to a poured concrete base to be used for storage purposes. 30 Comp. Gen. 487 (1951).
- Frame buildings with cement foundations, cement floors, and shingled roofs, to be used for storage and repair of tools and equipment. 5 Comp. Gen. 575 (1926).
- Hangars, shops, and storehouses on landing fields. 2 Comp. Gen. 14 (1922), modified, 2 Comp. Gen. 133 (1922).
- Pontoon storage shed. 16 Comp. Dec. 685 (1910).

An extension or addition to a public building is also covered. A-59252, December 28, 1934; A-40231, January 11, 1932.

Some examples of structures which have been held not to be “buildings” within the scope of 41 U.S.C. § 12, regardless of permanency, are:

- Automated self-service unit covered by canopy and containing various postal vending machines, weight scales, and a parcel depository unit, to be placed in shopping center. 45 Comp. Gen. 525 (1966).
- Large testing chamber with 50-inch concrete walls for use in a research project. 39 Comp. Gen. 822 (1960). See also B-50958, August 9, 1945 (heavy concrete chamber partly above and partly below ground intended for temporary use in testing explosives).
- Greenhouses. B-141793-O.M., February 17, 1960. Earlier decisions had exempted temporary greenhouses. E.g., 7 Comp. Gen. 629 (1928). The 1960 case extended the proposition to greenhouses that were more or less permanent.

With respect to temporary structures, the demarcation between the permissible and the impermissible is not as bright as one might wish. The statement found in numerous decisions over the decades is that 41 U.S.C. § 12 applies to “any structure in the form of a building not clearly of a temporary character.” E.g., 42 Comp. Gen. 212, 214 (1962); 9 Comp. Gen. 75, 76 (1929); 2 Comp. Gen. 14 (1922), modified, 2 Comp. Gen. 133 (1922). See also 26 Comp. Dec. 829 (1920). The decisions thus attempt to strike a balance between the language of the statute, which does not distinguish between permanent and temporary structures (e.g., 10 Comp. Gen. 140, 142 (1930)), and a result which could in some cases border on the ridiculous.

As one example, the statute has been found applicable to a temporary shed or storehouse of frame construction with sheet metal siding, to be used to house motor vehicles. 6 Comp. Gen. 619 (1927). Other examples include:

> "temporary sheds for the shelter of farm animals; portable houses for temporary use of employees; temporary portable buildings for use in the detention and treatment of aliens; barns, sheds, cottages, etc., of frame construction of a temporary nature with dirt floors and contemplated to be destroyed; . . . ."
> 42 Comp. Gen. 212, 214 (1962).[91]

The fact that a structure is prefabricated and movable is not dispositive. Id. at 215.

On the other hand, 41 U.S.C. § 12 has been found inapplicable in the following cases, summarized in 7 Comp. Gen. 629, 630 (1928):

- Wood frame shed to house a fumigation tank used in fumigating cotton against the pink Mexican bollworm. A-17265, March 16, 1927.
- A cabinet 30 feet square with glass sides, for use in studying light in relation to certain diseases. A-18335, May 16, 1927.

While these examples do not lend themselves to the formulation of a black-letter rule, it will be easier to find an exception in the case of a structure to be used for a clearly temporary experiment or research project, and correspondingly more difficult to find one where the structure is to be used for either residential or office space for employees. See 10 Comp. Gen. 140 (1930); B-50958, August 9, 1945. Also, a structure is not temporary merely because the agency calls it temporary. 63 Comp. Gen. 422, 436 (1984) (airfields and other military facilities in Honduras); 21 Comp. Dec. 420 (1914) (various residential structures).

The "specific purpose" requirement of 41 U.S.C. § 12 applies not only to public buildings but to "public improvements" as well. The term in this context refers to improvements to real property. 45 Comp.

[91]The alien case, which somewhat inexplicably does not cite 41 U.S.C. § 12, is 13 Comp. Dec. 355 (1906). The other examples in the quoted passage appear to be from unpublished decisions of the Comptroller of the Treasury. See 6 Comp. Gen. at 621. Unfortunately, the actual texts of these are no longer available as a practical matter.

Gen. 525, 526 (1966). Thus, major alterations or renovations to a public building are public improvements for purposes of 41 U.S.C. § 12. E.g., 39 Comp. Gen. 723 (1960). Several cases in this category have involved the conversion of a building to a different use. 38 Comp. Gen. 758 (1959) and 38 Comp. Gen. 588 (1959) (conversion of hospital building for occupancy by federal agency); 37 Comp. Gen. 767 (1958) and B-135411, March 24, 1958 (conversion of buildings into schools); B-76841, August 23, 1948 (conversion of school building to clinic); B-170587-O.M., October 21, 1970 (conversion of office space into laboratories); B-151369-O.M., November 15, 1963, and B-151369-O.M., September 10, 1964 (conversion of former bull barn to research laboratory). The work in all of these cases was held subject to 41 U.S.C. § 12.

Similarly, the term "public improvement" as used in 41 U.S.C. § 12 has been held to include the installation of an elevator in a government building (8 Comp. Gen. 335 (1929)); the enlargement and modernization of a cafeteria (27 Comp. Gen. 634 (1948)); and the installation of central air conditioning in a library building (B-118779, November 14, 1969).

Another line of cases holds that minor structural alterations necessary to accommodate specialized equipment needed in the performance of an authorized function may be funded from general operating appropriations. 16 Comp. Gen. 816 (1937); 16 Comp. Gen. 160 (1936); 5 Comp. Gen. 1014 (1926); 3 Comp. Gen. 812 (1924). While these cases do not mention 41 U.S.C. § 12, the clear implication is that the minor alterations do not rise to the level of public improvements for purposes of the statute. See B-170587-O.M., October 21, 1970. The "exception" of 3 Comp. Gen. 812 and its progeny is limited to specialized work or equipment, and does not extend to alterations designed to improve a building for office purposes generally. 17 Comp. Gen. 1050 (1938).

The temporary versus permanent distinction discussed above in the context of public buildings can also be relevant in the case of improvements. If an agency would be authorized to construct a temporary facility without having to comply with 41 U.S.C. § 12, the statute would be equally inapplicable to the repair of an existing government-owned facility for the same temporary use. B-117124, October 1, 1953.

The requirement of 41 U.S.C. § 12 also applies to public improvements which do not involve buildings, such as roads and airfields. 63 Comp. Gen. 422, 435-36 (1984); 41 Comp. Gen. 255 (1961); 29 Comp. Gen. 235 (1949).

Once it is determined that a given building or improvement is within the scope of 41 U.S.C. § 12, the clearest way to satisfy the statute is, naturally, for the item to be explicitly addressed in the relevant appropriation act. However, this degree of explicitness is not absolutely required. E.g., B-8816, March 9, 1940 (appropriation for construction of public works project is available to construct buildings necessary to the project even though not specified in the appropriation). The essence of 41 U.S.C. § 12 is not that public buildings and improvements are in any way bad or undesirable, but merely that they are sufficiently important—and sufficiently costly—that agencies should not undertake them without congressional sanction. Thus, for example, where (1) the Federal Civil Defense Act authorized an agency to renovate facilities, (2) the relevant appropriation provided a lump sum to "[carry out] the provisions of the Federal Civil Defense Act," and (3) the agency had included the desired renovations in its budget submission, this was enough to satisfy 41 U.S.C. § 12. 39 Comp. Gen. 723 (1960). In a case which included elements (1) and (2) of this formula but not (3), GAO concluded that 41 U.S.C. § 12 was not satisfied and the appropriation was not available, because "it is clear that the [improvement] is an entirely different project or purpose from any made known to the Congress and for which the Congress appropriated funds." 37 Comp. Gen. 767, 771 (1958). Merely burying an item in a budget submission without the required nexus in the appropriation act (item (3) without item (2)) is equally insufficient. B-76841, August 23, 1948.

Short of the "formula" of 39 Comp. Gen. 723, or some comparable set of circumstances from which congressional approval can be necessarily implied, general operating appropriations are not available for items within the scope of 41 U.S.C. § 12. The term "necessary expenses" in an appropriation is not enough. 38 Comp. Gen. 758 (1959); 4 Comp. Gen. 1063 (1925). Similarly, a "necessary expense" justification as described in Chapter 4, however legitimate, is not enough to overcome the statutory hurdle of 41 U.S.C. § 12. 42 Comp. Gen. 212, 215 (1962); 5 Comp. Gen. 575, 577 (1926). Exceptions have occurred in a very few cases in which failure to construct the building or improvement would literally "render it impossible to accomplish the purpose for which the appropriation was made." 10 Comp. Gen. 140, 141 (1930). One example is 2 Comp. Gen. 133 (1922). Use of a general operating appropriation in disregard of 41 U.S.C. § 12 can result in violation of the Antideficiency Act. E.g., B-118779, November 14, 1969.

The requirement of 41 U.S.C. § 12 attaches not only to a direct payment to a contractor, but as well to an advance or reimbursement to a working capital (or other revolving) fund. 30 Comp. Gen. 453 (1951); B-119846, May 27, 1954. In other words, the device of a revolving fund cannot be used to circumvent the statute. However, the statute does not apply to the expenditure of grant funds by a grantee unless so provided in the applicable program legislation, regulations, or terms of the grant agreement. B-173589, September 30, 1971.

A common-sense exception is found in 7 Comp. Gen. 472 (1928). Legislation authorized the appropriation of $150,000 toward the erection of a memorial building to be built with a mix of appropriated funds and private donations. The legislation further provided that the appropriation could constitute no more than half of the total cost. The Comptroller General advised that once the appropriation was made and the donations in hand, a contract for the total cost of the building would not violate 41 U.S.C. § 12, even though it would obviously involve "a larger sum of money than that appropriated for the specific purpose." Id. at 474.

(2) Contract authority under partial appropriations

A statute enacted in 1908, 40 U.S.C. § 261, recognizes that, for any number of reasons, Congress may not wish to fully fund the construction of a public building up front. It provides:

> "[I]n all cases where appropriations are made in part only for carrying into effect the provisions of legislation authorizing the acquisition of land for sites or for the enlargement of sites for public buildings, or for the erection or remodeling, extension, alteration, and repairs of public buildings, the Administrator of General Services, unless otherwise specifically directed, may enter into contracts within the full limit of cost fixed by Congress therefor."

Thus, if Congress has established the total cost of the construction or renovation of a public building, or of related site acquisition, and subsequently appropriates only part of the money, GSA may enter into a legally binding contract for the full project, not to exceed the total authorized cost.

There is surprisingly little discussion of this statute in the decisions. Our research has disclosed only 20 Comp. Gen. 272, 274 (1940), noting almost in passing that 40 U.S.C. § 261 effectively modifies 41 U.S.C. § 12 to the extent of its terms. What is clear is that, to that extent, 40 U.S.C. § 261 authorizes GSA to enter into contracts in excess or advance of appropriations, and therefore is an exception to the Antideficiency Act. A contract authorized by 40 U.S.C. § 261 is "authorized by law" for purposes of 31 U.S.C. § 1341(a). See 28 Comp. Gen. 163 (1948) (construing similar authority appearing in an appropriation act). Without such authority, the contract would have to be made subject to future appropriations and could confer no rights beyond the amount of the partial appropriation. 14 Comp. Dec. 755 (1908); 13 Comp. Dec. 478 (1907).

(3) Duration of construction appropriations

Two provisions of law authorize appropriations for the construction of public buildings to remain available beyond the end of the fiscal year in which they are appropriated. First, 31 U.S.C. § 1307 provides:

> "Amounts appropriated to construct public buildings remain available until completion of the work. When a building is completed and outstanding liabilities for the construction are paid, balances remaining shall revert immediately to the Treasury."

The second statute is 31 U.S.C. § 1301(c), which prohibits an appropriation contained in a regular, annual appropriation act from being construed to be permanent or available beyond the fiscal year unless it expressly so states or unless it is for one of four specifically named categories—rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps.[92]

[92]There are also some agency-specific statutes which authorize construction appropriations to remain available beyond the end of the fiscal year. E.g., 10 U.S.C. § 2860 (military construction); 7 U.S.C. § 2209b (certain Department of Agriculture appropriations); 14 U.S.C. § 656(a) (Coast Guard). Their effect is similar to the general provisions discussed in the text.

Since approximately 1970, most if not all appropriation acts have included a general provision, the origin of which is discussed in some detail in Chapter 2, which states that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." The key phrase is "unless expressly so provided herein." The effect of this general provision is to override statutes like 31 U.S.C. § 1307 and to render them little more than authorizations which require specific language in the appropriation if they are to be implemented. 58 Comp. Gen. 321 (1979); 50 Comp. Gen. 857 (1971). Consequently, in an appropriation act which contains this general provision, a construction appropriation is no different from any other appropriation with respect to duration; it is a one-year appropriation unless it expressly specifies otherwise.

Prior to the advent of the general provision quoted above, 31 U.S.C. § 1307 had been construed—and given a fairly narrow application—in somewhat over a dozen decisions. If an appropriation act were to be enacted which did not contain the "current fiscal year" general provision or something comparable, 31 U.S.C. §§ 1301(c) and 1307, and the related case law, would come into more direct play.

Essentially, the early decisions found 31 U.S.C. §§ 1301(c) and 1307 applicable only to appropriations which provide for the original construction of public buildings, rejecting attempts to apply the authority broadly to any appropriation somehow related to a construction project. 36 Comp. Gen. 790, 793 (1957); 8 Comp. Gen. 519, 520 (1929). Thus, the authority does not apply to appropriations for the following because they are not appropriations for the construction of a public building:

- Purchase of land. 17 Comp. Gen. 631 (1938).
- Clearance of a site upon which a building would later be constructed. 8 Comp. Gen. 519 (1929).
- Preparation of plans or designs. 36 Comp. Gen. 790 (1957); 19 Comp. Gen. 702 (1940).
- Repairs or improvements. 1 Comp. Gen. 435 (1922), <u>aff'd upon reconsid.</u>, 1 Comp. Gen. 532 (1922).
- Remodeling and/or enlarging. 10 Comp. Gen. 454 (1931); 7 Comp. Gen. 619 (1928).

The no-year authorization of 31 U.S.C. § 1307 also does not apply, regardless of whether the appropriation is one for public building construction, if the appropriation contains other language restricting it to some definite time period. 24 Comp. Gen. 942 (1945); 23 Comp. Gen. 150 (1943); 18 Comp. Gen. 969 (1939); 6 Comp. Gen. 783 (1927). Nor does it apply to an amount earmarked for construction in a lump-sum Salaries and Expenses appropriation. 37 Comp. Gen. 246 (1957). The earmark has the same obligational availability as the parent appropriation unless expressly provided otherwise. Id. at 248; A-25480, December 18, 1928.

In sum, an appropriation (1) for the original construction of a public building, (2) which does not specify any other period of availability, and (3) which is contained in an appropriation act which does not include the "current fiscal year" general provision or some comparable limitation, may be regarded as a no-year appropriation without the need for the traditional "to be available until expended" language. 36 Comp. Gen. at 793-94; B-154459, December 9, 1964.[93]

(4) Design fees

Before a shovel ever touches the ground, somebody has to design the building. Just about every construction project includes the services of professional architects and engineers ("A&E"). Those services range from the preparation of plans and specifications to inspection and supervisory services during actual construction. At one time, there was no authority to hire a private architect to prepare plans for a public building. 21 Comp. Dec. 336 (1914). Today, the United States Code is dotted with statutes authorizing the government to contract for A&E services. Among the more important provisions are 40 U.S.C. § 609(a) (General Services Administration), 10 U.S.C. §§ 4540(a), 7212(a), and 9540(a) (Army, Navy, and Air Force, respectively); and 38 U.S.C. §8106(b) (Veterans Affairs medical facilities).

Contracting for A&E services is governed by the Brooks Architect-Engineers Act, 40 U.S.C. §§ 541-544, which prescribes a negotiation

[93]Although there was no need for the decisions to so specify at the time, the appropriation acts in these two cases did not include the "current fiscal year" provision.

procedure based primarily on competence rather than price. The Act's policy is:

> "to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices." 40 U.S.C. § 542.

The Brooks A&E Act does not apply merely because part of the contract work will be done by architects or engineers; rather, it applies to a procurement which "uniquely or to a substantial or dominant extent requires performance by an A-E firm." 61 Comp. Gen. 377 (1982). It also applies to small business set-asides, including those under section 8(a) of the Small Business Act. 59 Comp. Gen. 20 (1979); B-129709, October 14, 1976. GAO will not question an agency's decision to compete an A&E contract rather than negotiate unless the agency's actions demonstrate a clear intent to circumvent the Act. 62 Comp. Gen. 297 (1983). For projects within the definition of "public building" in the Public Buildings Act of 1959, 40 U.S.C. § 612(1), the A&E procurement is done by the General Services Administration unless delegated to another agency in accordance with 41 C.F.R. §§ 101-19.402(c) and 101-19.501. 40 U.S.C. §§ 609, 614.

The Clinger-Cohen Act of 1996, Pub. L. No. 104-106, Div. D, sec. 4105 (often referred to as the "Federal Acquisition Reform Act"), authorized "two-phase" selection procedures for "design-build" acquisitions. These procedures, codified at 10 U.S.C. § 2305a and 41 U.S.C. § 253m, authorize the use of two-phase selection procedures for entering into a contract for the design and construction of a public building, facility, or work. The conference report on the Act indicates that this provision was "not intended to modify the Brooks Architect-Engineers Act." H.R. Rep. No. 104-450, at 966 (1996). Consequently, the two-phase approach represents an alternative to the "design-bid-build" procedures of the Brooks A&E Act.

The two-phase selection approach may be used when three or more offers will likely be received, design work must be completed before a price proposal can be submitted, substantial costs will be incurred by the prospective offerors in preparing their proposals, and certain other specific criteria have been considered. The agency solicits phase-one proposals that describe the offerors' technical approaches and technical qualifications. The agency then solicits phase-two proposals from the most qualified offerors, normally not more than five. Final consideration is based on technical merit and price.

Architects and engineers, like the rest of us, expect to be paid for their services. They should be paid, says the Brooks Act provision quoted above, "at fair and reasonable prices." In order to keep "fair and reasonable" from becoming excessive, a series of statutes, all of which actually predate the Brooks Act, imposes a percentage ceiling on A&E fees. Civilian procurements are governed by 41 U.S.C. § 254(b), enacted as part of the Federal Property and Administrative Services Act of 1949, which provides in relevant part that—

"a fee inclusive of the contractor's costs and not in excess of 6 percent of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project."

A very similar provision, originating in the Armed Services Procurement Act of 1947, is found in 10 U.S.C. § 2306(d). The fee limitation of 41 U.S.C. § 254(b) applies to all civilian A&E procurements unless expressly exempted. E.g., 46 Comp. Gen. 183, 189-190 (1966) (ceiling applies to A&E services procured under authority of what is now 38 U.S.C. § 513); B-152306, January 5, 1967 (limited exemption under 22 U.S.C. § 296). The limitation in 10 U.S.C. § 2306(d) applies to the Coast Guard and the National Aeronautics and Space Administration as well as the military departments. 10 U.S.C. § 2303.

In addition, the Department of the Army is authorized to procure A&E services "for producing and delivering designs, plans, drawings, and specifications needed for any public works or utilities project of the Department." 10 U.S.C. § 4540(a). Subsection (b) then provides:

"The fee for any service under this section may not be more than 6 percent of the estimated cost, as determined by the Secretary, of the project to which it applies."

Nearly identical limitations exist for the Navy (10 U.S.C. § 7212(b)) and the Air Force (10 U.S.C. § 9540(b)). These provisions originated in 1939. See 46 Comp. Gen. 556, 559 (1966).

Certain terminology is common to all of the statutes. Thus, the fee is to be based on the estimated cost of a project relating to public works or utilities. GAO has offered the following guidance with respect to "estimated costs":

> "[I]n the absence of definitive legislative expression otherwise, the term 'estimated cost' of a project may be said to comprehend the reasonable cost of a project erected in accordance with the plans and specifications, and that the inclusion of cost elements generally not covered by the plans and specifications such as furniture and equipment installed for the occupancy and use of a project would appear to be questionable." B-146312-O.M., November 28, 1961.

"Project" means the structure or public work "for which the architect-engineer undertakes in his contract to prepare the plans, etc., and not any larger budgetary or other project of which it may form a part." 40 Comp. Gen. 188, 191 (1960). Thus, if the overall project is to erect a complex of three buildings, the "project" for purposes of an A&E contract covering one of the buildings is that one building, not all three. A broader definition "would allow the architect-engineer's fee to be based on the cost of work for which he rendered no service." Id. See also 47 Comp. Gen. 61, 67 (1967); B-152306, January 24, 1967; B-115013-O.M., April 28, 1953.

The term "public works" has been addressed under a variety of statutes. The term generally relates to construction work. 17 Comp. Gen. 545 (1938), modified, A-90922, February 23, 1938. It has been broadly defined as fixed works or movable property the title to which is vested in the United States. 35 Comp. Gen. 454, 455 (1956); 19 Comp. Gen. 467, 470 (1939). A similarly broad definition is "all fixed works contracted for public use." 35 Comp. Gen. at 455; 19 Comp. Gen. at 469; 38 Op. Att'y Gen. 418, 422 (1936). The term "utilities" in the construction context "is commonly understood to have reference to such items as sewer and water facilities, heating devices, electric wires and fixtures, etc." 21 Comp. Gen. 167, 170 (1941). While these cases did not involve the A&E fee limitation, the same definitions should nevertheless be applied. B-146312-O.M., November 28, 1961. The Navy statute also includes construction of vessels or aircraft. 10 U.S.C. § 7212(a).

The A&E fee limitation statutes—41 U.S.C. § 254(b), 10 U.S.C. § 2306(b), and the three 1939 statutes—apply to all contracts regardless of type, cost-plus as well as fixed-price. 46 Comp.

Gen. 556 (1966); 46 Comp. Gen. 183 (1966); B-115013-O.M., April 28, 1953.

Differences in the statutory language have produced some controversy over precisely what to include when assessing compliance with the fee limitation, i.e., what amounts are included in the total subject to the 6 percent limit. The 1939 statutes authorize the procurement of A&E services for the production and delivery of plans and designs, and the fee limitation in each of the 1939 statutes applies to services "under this section." Thus, it is clearly the case that, under 10 U.S.C. §§ 4540, 7212, and 9540, the 6 percent limitation relates only to the production and delivery of plans and designs. 22 Comp. Gen. 464 (1942); 46 Comp. Gen. 556, 564 (1966). If the A&E contract includes supervisory services as well as production and delivery, the 6 percent does not apply to those amounts paid to the contractor for the supervisory services. 22 Comp. Gen. at 466. To take a simplified illustration, the 6 percent ceiling on a $100 construction contract is $6. If the A&E contract includes $5 for production and delivery and another $5 for supervisory services, there is no violation.

The remaining A&E statutes—10 U.S.C. § 2306(d) and 41 U.S.C. § 254(b)—do not include the specific "production and delivery" language. At one time, GAO was inclined to view the limitation under these statutes as applicable to the total contract price under the A&E contract for whatever services it may have included, not just production and delivery. 46 Comp. Gen. 573 (1966) (41 U.S.C. § 254(b)); 46 Comp. Gen. 556, 564-65 (1966) (10 U.S.C. § 2306(d)). However, the conclusions were not free from doubt and GAO was in the process of conducting a governmentwide review of A&E contracting, so both decisions said, in effect, to disregard the conclusions pending further developments. In 1982, GAO reviewed those developments and concluded that Congress had effectively affirmed "that the fee limitation relates only to the production of plans, drawings, and specifications." B-205793, January 18, 1982. Accordingly, all of the A&E fee limitation statutes now have a uniform interpretation—the 6 percent ceiling applies only to costs relating to the production and delivery of plans and designs. This of course would include the proportionate share of administrative costs attributable to support of production and delivery services. B-258058, May 8, 1995.

The view expressed in B-205793, January 18, 1982, is consistent with the Federal Acquisition Regulation, which provides:

"For architect-engineering services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees." 48 C.F.R. § 15.404(c)(4)(i)(B).

Once it is determined which services under the A&E contract "count" against the fee limitation, the total payment to the A&E contractor for those covered services may not exceed 6 percent of the estimated cost of the construction contract, regardless of the type of contract used for the A&E procurement. Thus, if the A&E contract is a cost-plus-fixed-fee contract, the 6 percent relates to the total payment for covered services, not just the fixed fee portion. 21 Comp. Gen. 580 (1941), aff'd, B-18126, March 19, 1942. It follows that an A&E contract in the form of a cost-plus-fixed-fee, with the total payment including the fixed fee not to exceed a specified dollar amount calculated to remain within the statutory limitation, is legally unobjectionable. B-106325, November 15, 1951.

Unless the contract provides otherwise, a mere increase in the cost of the construction contract—for example, if the lowest bid received exceeds the estimated cost on which the A&E fee was based—does not entitle the A&E contractor to an increase in fee. Hengel Associates, P.C., VABCA No. 3921, 94-3 B.C.A. ¶ 27,080 (1994); R.M. Otto Co., Inc. & Associates, VABCA No. 1526, 82-2 B.C.A. ¶ 15,889 (1982); Shaw Metz & Associates, VACAB No. 774, 71-1 B.C.A. ¶ 8679 (1971); William Cramp Scheetz, Jr., ASBCA No. 9501, 1964 B.C.A. ¶ 4340 (1964). As the Hengel board in particular emphasized, the 6 percent is a ceiling, not an entitlement, and does not prohibit the parties from contracting for a lower amount. 94-3 B.C.A. at ¶ 134,965.

Of course, there are situations in which the fee may be increased. If the A&E contract is modified under the "Changes" clause to increase the scope of the work, a fee increase is proper, still subject to the 6 percent ceiling. B-152306, January 24, 1967. See also Skidmore, Owings & Merrill, ASBCA No. 6062, 1962 B.C.A. ¶ 3332 (1962). It is also possible to increase the fee without regard to the 6 percent limit, as discussed in the following passage from 47 Comp. Gen. 61, 67 (1967):

"The project to which an architect-engineer fee is applicable is the project for which the architect-engineer undertakes in his contract to prepare plans, etc. [Citation omitted.] Where the site and nature of a project are so changed as to render virtually useless any [A&E] work done prior to administrative determination to effect such change, it would be unreasonable, in light of the statutory purpose, to carry forward against the new project any charges against the fee limitation incurred under the original project. Although the purpose to be served by a building project may remain unchanged, that is not to say that the conceptual design of the building and its location may be substantially altered without at some point giving rise to a new project for the purpose of applying the fee limitations in question."

b. Some Agency-Specific Authorities

If construction were governed solely by 41 U.S.C. § 12, the funding process would be cumbersome and would afford little flexibility. While 41 U.S.C. § 12 remains the cornerstone of congressional control of major construction projects, Congress has enacted various supplemental provisions for agencies with ongoing construction responsibilities,[94] all of which can be viewed as exceptions to 41 U.S.C. § 12.

(1) Military construction

Not surprisingly,[95] the most detailed and comprehensive scheme is that applicable to the Defense Department and the military departments.[96] Typically, construction funds are appropriated to each department in a lump sum to be used "as authorized by law," which means in accordance with authorization acts required by 10 U.S.C. § 114(a)(6).[97] Most of the funds are authorized by installation, in line-item format. In addition, each department

[94]For example, consider the VA's authority to build medical facilities under 38 U.S.C. §§ 8103, 8104, 8106 (which includes a provision roughly analogous to 41 U.S.C. § 12).

[95]The reason it is not surprising is that, as we will see later, the Public Buildings Act does not apply to construction on military installations.

[96]The funding structure for Coast Guard construction projects is based on the same key elements as that for military construction—a requirement for prior authorization combined with flexibility for smaller projects. See S. Rep. No. 88-205, reprinted at 1963 U.S.C.C.A.N. 699-704.

[97]Examples for 1994 are the Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, Div. B, 107 Stat. 1547, 1856, (1993) and the Military Construction Appropriations Act, 1994, Pub. L. No. 103-110, 107 Stat. 1037 (1993). As these examples illustrate, the authorization and appropriation acts are occasionally enacted in reverse order.

receives a lump-sum authorization for "unspecified minor military construction projects."

Substantive provisions are found in the Military Construction Codification Act, codified chiefly in 10 U.S.C. chapter 169.[98] "Military construction" is defined broadly as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation." 10 U.S.C. § 2801(a). A "military construction project" is all military construction "necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility" or authorized portion thereof. 10 U.S.C. § 2801(b). "Minor military construction" is military construction "(1) that is for a single undertaking at a military installation, and (2) that has an approved cost equal to or less than $1,500,000." 10 U.S.C. § 2805(a)(1).

It is provided in 10 U.S.C. § 2805(a)(1) that, "within an amount equal to 125 percent of the amount authorized by law for such purpose"—i.e., the lump-sum minor military construction authorization—each department may carry out minor military construction projects as defined above which are "not otherwise authorized by law." Projects costing more than $500,000 must first be reported to Congress. 10 U.S.C. § 2805(b)(2). Subsection (c)(1) further enhances flexibility by permitting unspecified minor military construction projects costing not more than $300,000 to be charged to Operation and Maintenance (O&M), rather than military construction, appropriations. In addition, cost variations are authorized in unusual and unanticipated situations, up to limits specified in 10 U.S.C. § 2853. The "minor milcon" provisions are simultaneously authorizations and limitations. See B-159451, March 20, 1967. Subject to authorized variations, GAO regards the cost of a "minor milcon" project as the cost at the time it is approved by the appropriate departmental official, regardless of subsequent increases in the statutory ceiling. B-175215, April 20, 1972.

As noted above, a construction project is defined in terms of a "complete and usable facility" unless something less is specifically

[98]The Act, which is constantly being reviewed and amended, addresses a variety of construction activities, although our coverage here is limited to an outline of the provisions governing "minor military construction."

authorized. It is not permissible to split a single project into smaller projects (sometimes given the fancy name "incremental construction") in order to stay below the ceiling for using O&M funds. B-234326.15, December 24, 1991; B-213137, January 30, 1986; B-159451, September 3, 1969; B-133316-O.M., August 27, 1962. As most of these references point out, directives of the military departments also prohibit splitting.

The military departments have traditionally distinguished between "funded costs" and "unfunded costs," including only the former in calculating costs for purposes of 10 U.S.C. § 2805. Funded costs consist primarily of the costs of labor (other than troop labor), materials, and equipment. Unfunded costs include such things as troop labor and equipment depreciation. GAO has accepted the legitimacy of the distinction. B-237137, January 30, 1986; B-133316, October 12, 1962.

Charging a construction project to O&M funds in excess of the statutory ceiling violates 31 U.S.C. § 1301(a) which prohibits using appropriated funds for other than their intended purpose. It also violates the Antideficiency Act unless unobligated construction funds are available to make an appropriate account adjustment. 63 Comp. Gen. 422, 423-24, 437-38 (1984).

(2) Continuing contracts: two variations

Construction projects often must extend beyond a single fiscal year. A device Congress has provided some agencies is the "continuing contract." For example, the Army Corps of Engineers engages in extensive public works construction activity. A significant authority available to the Corps is 33 U.S.C. § 621:

"Any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing contracts."

Under a continuing contract, as the term is used in this context, the Corps enters into a multi-year contract for the completion of a construction project, although funds are sought and appropriated only in annual increments to cover work planned for the particular year. See C.H. Leavell and Co. v. United States, 530 F.2d 878, 886 (Ct. Cl. 1976). This statute is an exception to both 41 U.S.C. § 12 and the Antideficiency Act. It authorizes the Corps to record the full contract price as an obligation at the time the contract is entered into, even though appropriations to liquidate the obligation have not yet been made. 56 Comp. Gen. 437 (1977). The authority of 33 U.S.C. § 621 applies equally to contracts financed by the Civil Works Revolving Fund (33 U.S.C. § 576). B-242974.6, November 26, 1991 (internal memorandum).

To the extent applicable, the laws relating to river and harbor improvements—including the "continuing contract" authority of 33 U.S.C. § 621—apply also to the Corps' shore protection and flood control projects. 33 U.S.C. §§ 426b, 701.[99]

A different type of continuing contract is authorized by a provision found in the Reclamation Act, 43 U.S.C. § 388:

> "When appropriations have been made for the commencement or continuation of construction or operation and maintenance of any project, the Secretary may . . . enter into contracts . . . for construction, which may cover such periods of time as the Secretary may consider necessary but in which the liability of the United States shall be contingent upon appropriations being made therefor."

While to an extent 43 U.S.C. § 388 can also be viewed as an exception to the Antideficiency Act (B-72020, January 9, 1948), it is a much more limited one than 33 U.S.C. § 621. Under 33 U.S.C. § 621, actual payment must await an appropriation, but the legal obligation arises, and is recordable, when the contract is entered into. Under 43 U.S.C. § 388, legal liability does not come into existence until the appropriation is made and, therefore, the full contract price cannot be recorded as an obligation at the time the contract is entered into.

The distinction is highlighted in 28 Comp. Gen. 163 (1948), which compared 43 U.S.C. § 388 with a provision appearing in an appropriation act which appropriated $1 million for a construction project and, in addition, authorized the Bureau of Reclamation to enter into contracts up to $1.6 million. The appropriation act provision—analogous to 33 U.S.C. § 621 as construed in 56 Comp. Gen. 437—authorized:

[99]In addition, the Corps is authorized to allocate funds from its annual appropriations, up to specified limits, for the construction of small projects which have not been specifically authorized. 33 U.S.C. §§ 426g (shore protection), 577 (rivers and harbors), 701s (flood control).

"the entering into of a firm contract which fully will obligate the faith and credit of the United States to its payment. The liability of the United States, on proper contracts entered into under its authority, is fixed and clear. It is not contingent in any way on the appropriation necessary to its fulfillment and the Government is fully obligated to satisfy its conditions." 28 Comp. Gen. at 165.

This is the classic concept of "contract authority." A contract under 43 U.S.C. § 388 is different, however. The decision continued:

"The liability of the United States on contracts entered into pursuant to [43 U.S.C. § 388], on the other hand, 'shall be contingent upon appropriations being made therefor.' Under such contracts, no legal obligation exists to pay their amounts unless and until appropriation is made therefor." 28 Comp. Gen. at 165-66.

See also B-72020, January 9, 1948.

The rights and obligations of the parties in the event of a funding shortfall will also vary depending on which type of continuing contract is in effect. Under the type of contract which amounts to "contract authority" such as 33 U.S.C. § 621, the contractor has a legal right to recover and can sue to enforce it. 56 Comp. Gen. at 442. While a court can never order Congress to appropriate money, a failure or refusal to appropriate funds to satisfy an obligation authorized by statute will not preclude a court from rendering a judgment. E.g., New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966).[100]

Under the type of contingent contract authorized by 43 U.S.C. § 388, the situation is different. In a case where the contracting agency had requested sufficient funds to finance the contract but Congress appropriated a much smaller amount, the Court of Claims held that as long as the agency allocates the funds on a rational and non-discriminatory basis, the contractor has no right to recover damages incurred as a result of the funding shortage. Winston Bros. Co. v. United States, 130 F. Supp. 374 (Ct. Cl. 1955). A similar holding is Granite Construction Co., IBCA No. 947-1-72, 72-2 B. C. A. ¶ 9762 (1972), denying recovery where the exhaustion of funds was due to a presidential impoundment.

[100]For further relevant discussion, see "Full faith and credit" heading in Chapter 14.

In S.A. Healy Co. v. United States, 576 F.2d 299 (Ct. Cl. 1978), however, the court granted an equitable adjustment where the contracting agency's budget request was "grossly inadequate" to support the funding level it had previously approved under the contract. The difference between Healy on the one hand and Winston and Granite on the other is that the funding shortfall in Healy was at least partly the agency's fault. Id. at 305.

While there are few cases, it seems fair to say that the extent of the agency's duty to at least ask for the money is still being formed and defined. The Healy court was careful to point out that it was not holding that the agency has an absolute contractual obligation to seek adequate funding. More precisely, said the court, if the agency chooses not to seek adequate funding, it can escape liability only if the contract unambiguously places the entire risk on the contractor, and if the agency provides "timely and candid" notification to help the contractor mitigate its loss. Id. at 307. See also San Carlos Irrigation and Drainage District v. United States, 23 Cl. Ct. 276, 283 (1991). Of course, the question will be foreclosed if the contract explicitly creates the duty. E.g., Municipal Leasing Corp. v. United States, 1 Cl. Ct. 771, 774 (1983) (contract clause obligating agency "to use its best efforts to obtain appropriations of the necessary funds to meet its obligations and to continue this contract in force"). Precisely what constitutes "best efforts" has yet to be determined.

(3) 7 U.S.C. § 2250

A Department of Agriculture provision, 7 U.S.C. § 2250, illustrates a different approach:

> "The Department of Agriculture is authorized to erect, alter, and repair such buildings and other public improvements as may be necessary to carry out its authorized work: Provided, That no building or improvement shall be erected or altered under this authority unless provision is made therefor in the applicable appropriation and the cost thereof is not in excess of limitations prescribed therein."

The purpose of this permanent authorization is to avoid the need for specific authorizations which 41 U.S.C. § 12 would otherwise require. Provision can thus be made in annual appropriation acts without being susceptible to a point of order. The origin and intent of 7 U.S.C. § 2250 are discussed in B-79640, October 18, 1948, and B-151369-O.M., November 15, 1963.

To implement 7 U.S.C. § 2250, the relevant appropriation will typically specify monetary limits on construction activities, plus whatever exemptions from those limits Congress may desire. See, for example, the appropriation under the heading Agricultural Research Service in the Agriculture Department's 1994 Appropriations Act, Pub. L. No. 103-111, 107 Stat. 1046, 1050 (1993). Exceeding an applicable limitation violates 41 U.S.C. § 12. B-151369-O.M., November 15, 1963.

(4) 15 U.S.C. § 278d

Another permanent authorization is 15 U.S.C. § 278d, applicable to the National Institute of Standards and Technology:

> "Within the limits of funds which are appropriated for the Institute, the Secretary of Commerce is authorized to undertake such construction of buildings and other facilities, and to make such improvements to existing buildings, grounds, and other facilities occupied or used by the Institute as are necessary for the proper and efficient conduct of the activities authorized herein."

This statute at one time included language, dropped in 1992, requiring specific provision in the relevant appropriation in order to construct a building costing over a specified amount. As the statute now stands, it is similar to 7 U.S.C. § 2250 in that it will insulate an appropriation from a point of order under congressional rules requiring prior authorization. It is also similar in that it, standing alone, does not satisfy 41 U.S.C. § 12. There would need to be at least the elements described in 39 Comp. Gen. 723 (1960), previously discussed in our coverage of 41 U.S.C. § 12. (Section 278d is the first element in the 39 Comp. Gen. 723 formula.)

The Institute finances its construction from a reimbursable Working Capital Fund pursuant to 15 U.S.C. § 278b. In order to use the Working Capital Fund, however, the appropriation to be charged with the reimbursement must itself be available for construction, that is, it must satisfy 41 U.S.C. § 12. 30 Comp. Gen. 453 (1951); 15 U.S.C. § 278b(b). Reimbursement should include indirect as well as direct costs. See B-117622, July 13, 1955; 15 U.S.C. § 278b(e).

Section 278d has been construed as applicable only to construction on government-owned land and not to leased property. B-130564, March 18, 1957; B-124596-O.M., August 26, 1955. A separate provision of law now authorizes, in the performance of Institute functions, "the erection on leased property of specialized facilities and working and living quarters when the Secretary of Commerce determines that this will best serve the interests of the Government." 15 U.S.C. § 278e(g).

c. Public Buildings Act

In 1949, the Federal Property and Administrative Services Act centralized a number of the government's housekeeping functions in the General Services Administration. Ten years later, Congress enacted the Public Buildings Act of 1959, Pub. L. No. 86-249, 73 Stat. 479, to do essentially the same thing for public buildings acquisition and construction. Amended significantly in 1972, 1976, and again in 1988,[101] the Act is found at 40 U.S.C. chapter 12.

The statute gives a fairly complicated definition of "public building." The term means—

> "any building, whether for single or multitenant occupancy, its grounds, approaches, and appurtenances, which is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, [specifically including such structures as office buildings, courthouses, warehouses, and similar Federal facilities]." 40 U.S.C. § 612(1).

The definition then goes on to list several exemptions, including buildings which are on the public domain; on military installations; on United States property in foreign countries; on Indian and Eskimo properties held in trust by the United States; on lands used in federal agricultural, recreational, and conservation programs, including related research; on or used in connection with river, harbor, flood control, reclamation, or power projects; used for nuclear production, research, or development projects; on or used in connection with housing or residential projects; on Department of Veterans Affairs installations used for hospital or domiciliary purposes. Id.; 41 C.F.R. § 101-19.003-6(a). Thus, wholly apart from specific exemptions Congress may from time to time legislate, the Public Buildings Act itself carves out several large exemptions from the definition. What's left is a "public building" governed by the Act.

[101]Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 216; Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, 90 Stat. 2505; Public Buildings Amendments of 1988, Pub. L. No. 100-678, 102 Stat. 4049.

In addition, leased buildings are not "public buildings." 41 C.F.R. § 101-19.003-6(b); 65 Comp. Gen. 722, 727-729 (1986).[102]

The first section of the statute, 40 U.S.C. § 601, sets the policy by declaring that "[n]o public building shall be constructed except by" GSA. "Construct" means simply "to build a public building," including related plans, specifications, studies and surveys. 41 C.F.R. § 101-19.003-3.

Section 604 of Title 40 of the United States Code deals with site acquisition. GSA is authorized to acquire sites needed for public buildings "by purchase, condemnation, donation, exchange, or otherwise." 40 U.S.C. § 604(a). GSA may solicit proposals but is not required to follow the competition requirements of the Federal Property and Administrative Services Act or the Federal Acquisition Regulation. 40 U.S.C. § 604(c); 71 Comp. Gen. 333 (1992). The site selected should be the one "most advantageous to the United States, all factors considered." 40 U.S.C. § 604(c). Meeting this standard requires "intelligent competition" which includes informing offerors of the evaluation factors to be applied and their relative importance. B-256017.4/B-256017.5, June 27, 1994. There is nothing improper under section 604 in soliciting expressions of interest and then, if the parties cannot agree to acceptable terms, instituting condemnation proceedings. 71 Comp. Gen. 511 (1992). It is similarly within GSA's discretion to reach agreement with the owner after requesting the Attorney General to initiate the condemnation. B-249131.4, June 24, 1993. Condemnation of a site for a public building is "obviously for a public use" for Fifth Amendment purposes. Certain Land in the City of Washington, D.C. v. United States, 355 F.2d 825, 826 (D.C. Cir. 1965).

The requirement in Executive Order No. 12072 to give preference to central business areas, discussed previously in connection with leasing, applies to site selection under 40 U.S.C. § 604. Therefore, it is within GSA's discretion when soliciting sites for public building

[102]Just because a leased building is not a "public building" for purposes of the Public Buildings Act does not mean that it is not a public building for purposes of other statutes. It is necessary to examine the particular statute and context. E.g., 34 Comp. Gen. 697 (1955) (Miller Act, Davis-Bacon Act, etc.); 30 Comp. Gen. 117 (1950) (Randolph-Sheppard Act); 17 Comp. Gen. 283 (1937).

construction to limit consideration to a central business area. B-251581.2, July 13, 1993.

As noted earlier, any construction project requires architectural and engineering services, and 40 U.S.C. § 609(a) authorizes GSA to procure those services. However, GSA must retain responsibility for all construction, including interpreting construction contracts, approving contract changes, certifying payment vouchers, and making final contract settlement. 40 U.S.C. § 609(c). To the maximum extent feasible, construction should comply with one of the nationally recognized model building codes, and should take into consideration state and local zoning laws and laws imposing landscaping, open space, minimum distance, and maximum height requirements. 40 U.S.C. §§ 619(a), (b).

Artistic concerns are also relevant. GSA regulations provide:

> "Fine arts, as appropriate, will be incorporated in the design of selected new public buildings. Fine arts, including painting, sculpture, and artistic work in other mediums, will reflect the national cultural heritage and emphasize the work of living American artists." 41 C.F.R. § 101-19.002(m).

This provision does not have an explicit statutory basis, but has long been in the regulations. See B-95136, March 26, 1976.

The Public Buildings Act also authorizes GSA to alter public buildings. 40 U.S.C. § 603(a). "Alter" includes "repairing, remodeling, improving, or extending or other changes in a public building." 40 U.S.C. § 612(5). As with construction, the term includes related plans, designs, surveys, etc. 41 C.F.R. § 101-19.003-1. GSA may do the work itself or may carry out any authorized construction or alteration by contract if deemed to be "most advantageous to the United States." 40 U.S.C. § 608. It may also contract with other agencies, such as the Army Corps of Engineers, under the Economy Act, 31 U.S.C. § 1535. See B-172186, April 5, 1971.

GSA may delegate most of its functions under the Public Buildings Act. 40 U.S.C. § 614. For projects whose estimated cost does not exceed $100,000, delegation is mandatory upon request. Id.; 41 C.F.R. § 101-19.501.

An important provision of the Public Buildings Act is the prospectus approval requirement of 40 U.S.C. § 606(a):

"In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 603 of this title, no appropriation shall be made to construct, alter, purchase, or to acquire any building to be used as a public building which involves a total expenditure in excess of $1,500,000 if such construction, alteration, purchase, or acquisition has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on [Transportation and Infrastructure] of the House of Representatives."[103]

The "except as provided in section 603" refers to 40 U.S.C. § 603, which authorizes GSA to alter public buildings and to acquire land necessary to carry out the alterations, and then provides:

"No approval under section 606 of this title shall be required for any alteration and acquisition authorized by this section the estimated maximum cost of which does not exceed $1,500,000."

Approval is obtained by submitting a prospectus to the specified committees. The contents of the prospectus, set forth in 40 U.S.C. § 606(a), include (1) a brief description of the building to be constructed, altered, purchased, or acquired; (2) the location of the building and an estimate of the maximum cost to the United States; (3) a comprehensive plan addressing the space needs of all government employees in the locality; (4) if construction is involved, a statement that other suitable space is not available either in government-owned buildings or at comparable cost; (5) justification for not using buildings identified pursuant to the National Historic Preservation Act; and (6) a statement of how much the government is already spending to accommodate the employees who will occupy the building to be constructed, altered, purchased, or acquired.

The project cost may be increased by up to 10 percent of the prospectus estimate without having to submit a revised prospectus. 40 U.S.C. § 606(b). Either committee may rescind its approval in the case of a project for construction, alteration, or acquisition if an appropriation has not been made within one year after the date of approval. 40 U.S.C. § 606(c). GSA may adjust any dollar amount specified in sections 606 and 603(b) annually "to reflect a percentage

[103]Section 606(a) also includes approval requirements for leases and for alterations to leased buildings, covered elsewhere in this chapter. The discussion in the text, unless the context clearly indicates differently, applies equally to all three.

increase or decrease in construction costs during the preceding calendar year, as determined by the composite index of construction costs of the Department of Commerce," promptly reporting any such adjustments to the committees. 40 U.S.C. § 606(f).

Nothing in the statute precludes a situation in which GSA secures the required approval with the appropriation to be made to some other agency. 46 Comp. Gen. 427 (1966). Since the approval requirement is a restriction on the appropriation of funds, it does not apply to the construction of a building where appropriated funds will not be involved, even where the building is clearly a "public building" and will be constructed by GSA. B-143167-O.M., September 27, 1960 (office building for Federal Deposit Insurance Corporation). It also does not apply to projects involving the United States Capitol. B-148004, October 20, 1969.

Prospectus approval may precede or follow enactment of the relevant appropriation. B-95136, October 11, 1979. Limiting language in the approval is not legally binding unless incorporated in the appropriation providing funds for the project. B-95136, February 7, 1977. If GSA does not comply with the prospectus approval requirement and Congress chooses to appropriate the money anyway, the appropriation might be subject to a point of order, but it would be a perfectly valid appropriation if enacted. Id.; B-95136, September 27, 1978; B-95136-O.M., December 23, 1975. Funds will be available for the project, with or without compliance with 40 U.S.C. § 606(a), if Congress specifically appropriates funds for the project, or if it can be clearly established that Congress knowingly included those funds in a lump-sum appropriation. Merely burying the project in budget justification material, however, is not enough. B-95136, October 11, 1979; B-95136-O.M., December 23, 1975.

In accord with these principles is Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962), in which the court held that GSA had no authority to condemn an office building where GSA (1) had not obtained prospectus approval as required by 40 U.S.C. § 606(a), and (2) purported to act under authority of a lump-sum appropriation which could not be demonstrated to include the building in question.

d. Scope of Construction Appropriations

Apart from obvious differences in factual context, determining the scope of a construction appropriation is not fundamentally different than for other types of appropriations. The process requires analyzing the language of the appropriation, the statutes and principles governing the use of appropriations in general, and the relationship of the construction appropriation to other appropriations available to the agency or for the project.

The first and most important determinant is the precise application of the language of the appropriation. For example, where language which would have appropriated funds for "beginning construction" was changed to "preparing for construction," the appropriation was not available for any of the costs of actual construction. B-122221, January 14, 1955. If there is any inconsistency between the language of the enacted appropriation and legislative history or prior bills, the enacted language must prevail. Id. The statutory language alone will not always provide the answer, however. Words like "facilities" and "appurtenances," for example, do not have obvious meanings and, absent clear instructions in legislative history, it is necessary to resort to other principles and precedents for guidance. See B-133148-O.M./B-132109-O.M., January 20, 1959.

The next element in our approach is the application of the statutes and principles governing the availability of appropriations generally with respect to purpose, time, and amount. Purpose availability is governed by the "necessary expense" doctrine discussed in Chapter 4. One illustration is the treatment of expenses of preparation of plans and specifications, or what we have previously referred to as "design fees." Congress may choose to provide separately for these expenses. E.g., 36 Comp. Gen. 790 (1957). If there is no separate appropriation, design fees are chargeable to the construction appropriation. As stated in B-71067, December 9, 1947:

> "[W]hen Congress appropriates funds for the construction of a building and does not otherwise appropriate funds for plans or supervision of its construction, it is not to be presumed that its intention was that the building be erected without either plans or supervision, but that the expenses of planning and superintendence being reasonably necessary and incident to the construction they are for payment out of the funds made available for such construction."

This being the case, design fees should not be charged to general operating appropriations. 18 Comp. Gen. 122 (1938), aff'g 18 Comp. Gen. 71 (1938); 15 Comp. Gen. 389 (1935). The same principle applies to work which is preliminary to the design work. Unless specifically provided for, it is chargeable to appropriations available for construction and not general operating appropriations. 11 Comp. Gen. 313 (1932) (site tests). Of course, the existence of a specific appropriation will preclude use of construction funds. B-9240, May 2, 1940 (specific appropriation for preliminary surveys). Where inspection or supervision of construction is performed by regular government employees, their salaries and related expenses are chargeable not to the construction appropriation but to the general Salaries & Expenses appropriation, or its equivalent, for the fiscal year in which the services are performed. 38 Comp. Gen. 316 (1958); 16 Comp. Gen. 1055 (1937), modified, A-86612, August 16, 1937.

The amount charged by a municipality for the "privilege" of connecting the sewer line of a government building to the municipal sewer system is a necessary cost of construction and therefore chargeable to construction appropriations. 19 Comp. Gen. 778 (1940); 9 Comp. Gen. 41 (1929); B-22714, March 19, 1942. This is true whether the connection is part of the original construction or subsequent remodeling or improvement. 39 Comp. Gen. 363 (1959).

We noted in Chapter 4 that reasonable expenses incident to dedication or cornerstone ceremonies for public buildings are regarded as a proper charge to appropriated funds. 53 Comp. Gen. 119 (1973) (engraving a ceremonial shovel); B-158831, June 8, 1966 (flowers for use as centerpieces); B-11884, August 26, 1940 (printing of programs and invitations); A-88307, August 21, 1937 (group photograph and recording of presidential speech). In each case, the proper appropriation to charge was the construction appropriation, not a general operating appropriation, the principle being stated in A-88307, and quoted in 53 Comp. Gen. at 120, as follows:

> "[T]he laying of cornerstones has been connected with the construction of public buildings from time immemorial and any expenses necessarily incident thereto are generally chargeable to the appropriation for construction of the building."

Availability as to time has been noted earlier under the "duration of construction appropriations" heading. With respect to amount, again, a construction appropriation is no different from any other appropriation. The appropriation of a specific amount for a construction project is a ceiling on the amount that can be obligated; it is the exclusive source of funds for the project and may not be augmented with funds from some other appropriation without congressional sanction. 20 Comp. Gen. 272 (1940); 19 Comp. Gen. 892 (1940), modified, B-9460, June 11, 1940; B-122221, January 14, 1955. If you cannot build what you want with the money Congress has provided, you must either go back to Congress and ask for more or reduce the scope of your project.

The third basic determinant is the relationship of the construction appropriation to other appropriations. What Congress has or has not provided for elsewhere often helps determine what it has or has not provided as part of the construction appropriation. One line of cases involves construction appropriations and appropriations available for repairs and maintenance. For expenses connected with original construction, the test is stated as follows:

> "Costs necessary to the completion of a construction project are, essentially, construction costs, and not costs of maintenance, operation, repair, alteration, or improvements, which costs ordinarily arise only after completion of the project." 19 Comp. Gen. 778, 781 (1940).

That case found sewer connection charges a proper cost of construction. In contrast, items such as acoustical ceilings, venetian blinds, partitioning, shrubbery and other plants, not acquired until after GSA had designated the building as substantially complete and occupancy had begun, could not be said to be "necessary for completion of the project," and were therefore properly chargeable to a repairs and improvements appropriation rather than construction. B-165152-O.M., October 15, 1968.

For expenses arising after completion of the original construction, the question is whether they can be legitimately regarded as within the scope of an appropriation for repairs and maintenance or improvements, or whether they must be treated as construction items. The Comptroller General has offered the following broad definitions:

> "It has been held that the term 'repair' includes anything that is reasonably necessary to keep up the premises. . . .
>
> . . . .
>
> "To 'maintain' means to preserve or keep in an existing state or condition, and embraces acts of repair and other acts to prevent a decline, lapse, or cessation from that state or condition, and has been taken to be synonymous with repair." 21 Comp. Gen. 90, 91-92 (1941).

Thus, an extension or addition to a public building cannot be charged to an appropriation for repairs. 4 Comp. Gen. 1063 (1925); 20 Comp. Dec. 73 (1913); 7 Comp. Dec. 684 (1901); 1 Comp. Dec. 33 (1894);[104] A-40231, January 11, 1932; A-1876, July 10, 1924. It is construction and, as the two unpublished decisions point out, must be handled as such, which means in compliance with 41 U.S.C. § 12. Similarly, appropriations for repairs and improvements are not available for extensive structural changes and replacement of worn-out equipment in a cafeteria (27 Comp. Gen. 634 (1948)), and certainly not for replacing a building entirely destroyed by fire (39 Comp. Gen. 784 (1960)). Treatment of walls and ceilings for soundproofing would qualify as an improvement, but it is not a "repair." 2 Comp. Gen. 301 (1922). If an item cannot be charged to a repair appropriation because it is more properly regarded as construction, it follows that charging a general operating appropriation is equally improper. E.g., 10 Comp. Dec. 633 (1904); B-132109, July 18, 1958.

Another line of cases addresses the relationship between construction appropriations and appropriations for equipment and furnishings. The "well-settled rule" is:

> "[A]n appropriation for the construction of a building is available only for the cost of construction proper and for equipment and/or fixtures permanently attached to the building and so essentially a part thereof that the removal of the same might cause substantial damage to the building." 12 Comp. Gen. 488, 489 (1933).

An item of equipment qualifies as a "fixture" for purposes of this rule if (1) it is permanently attached to the realty, or (2) if not permanently attached, (a) it is necessary and indispensable to the completion and operation of the building, or (b) the structure was designed and built for the purpose of housing the equipment. B-133148-O.M./B-132109-O.M., August 18, 1959.

Use of construction funds rather than an appropriation for equipment and furnishings was proper in 9 Comp. Gen. 217 (1929) (installation of cafeteria and associated equipment), and B-118779, November 14, 1969 (duct work, acoustical work, sprinklers, electrical fixtures, heating and cooling equipment). Cases holding

[104]Regarding 1 Comp. Dec. 33, did someone wager we could not find a case on "erecting an outhouse"? You lose.

construction appropriations to be the improper source of funds include 12 Comp. Gen. 488 (1933) (portable fire extinguishers); 7 Comp. Gen. 474 (1928) (window shades); and 26 Comp. Dec. 111 (1919) (linoleum which could be removed or replaced without material damage to the floor). All of these cases assume the existence of a separate appropriation for equipment and furnishings. Absent a separate appropriation, use of the construction appropriation would be proper if necessary to make the building usable for its intended purpose (A-43075-O.M., August 27, 1932), but would not be proper for furniture or equipment not required for the construction (B-123240, June 9, 1955). Also, there is of course no problem if the construction appropriation is expressly made available for the purchase and installation of furniture. 7 Comp. Gen. 619 (1928).

2. Operation and Control

a. Who's in Charge?

As with construction and leasing, the operation and control of public buildings is centralized in the General Services Administration. GSA derives its authority from several sources:

- Various provisions of the Federal Property and Administrative Services Act of 1949 and the Public Buildings Act of 1958, noted later in this discussion, which assign specific responsibilities to GSA.
- Miscellaneous provisions of title 40 which are not part of the Federal Property or Public Buildings Acts. Examples are 40 U.S.C. §§ 19 (GSA "shall have charge of the public buildings and grounds in the District of Columbia"); 283 (furniture for new public buildings must be procured in accordance with plans and specifications approved by GSA); 285 (GSA has exclusive control over public buildings outside of the District of Columbia purchased or constructed from appropriations under GSA's control); and 298d (GSA authorized to name or rename buildings under its control, even if previously named by statute).
- Section 103 of the 1949 Act, 40 U.S.C. § 753, which transferred to GSA all functions of its predecessor, the Federal Works Agency.
- Reorganization Plan No. 18 of 1950, sections 1 and 2, 40 U.S.C. § 490 note, which transferred to GSA, respectively, "all functions with respect to assigning and reassigning space" in buildings owned or leased by the government and "[a]ll functions with respect to the

operation, maintenance, and custody of office buildings" owned or leased by the government.

While GSA's authority is thus broad and comprehensive, there are significant exceptions.[105] However, unless an agency falls within one of these exceptions, has its own specific statutory authority,[106] or has a delegation from GSA, GSA's authority is exclusive and the agency has no authority to procure building services directly. 61 Comp. Gen. 658 (1982).

b. Allocation of Space

One of GSA's functions under the Federal Property and Administrative Services Act is "to assign and reassign space of all executive agencies in Government-owned and leased buildings in and outside the District of Columbia." 40 U.S.C. § 490(e). See also 40 U.S.C. § 304a. Space assignments should be advantageous in terms of economy, efficiency, or national security. 40 U.S.C. § 490(e). GSA's procedures, as well as instructions on when and how to submit requests for space and how to appeal unfavorable determinations, are contained in the Federal Property Management Regulations, 41 C.F.R. Subpart 101-17.1.

Space assignment is one of the functions GSA inherited from its predecessor, the Public Buildings Administration of the Federal Works Agency. Determinations under this authority, the Attorney General has noted, as with all discretionary authority, "should not be made abstractly, or in an arbitrary manner, or without ascertainment and due consideration of the true needs of an affected department or agency." 40 Op. Att'y Gen. 140, 143 (1941).

Incident to the assignment of space is the determination—within some bounds of reason—of how much space to assign. A

[105]Some exceptions are found in the definition of "public building," noted under the Public Buildings Act heading earlier in this section. The 1950 reorganization plan includes others, several of which are noted in our discussion of the Federal Property and Administrative Services Act under the Leasing heading. Exceptions from GSA's authority under the Federal Property Act are found in 40 U.S.C. §§ 472(d) (definition of "property") and 474. Still others may be contained in various agency-specific or program-specific statutes.

[106]GAO, for example, has "exclusive custody and control" over its main headquarters building in Washington, "including operation, maintenance, protection, alteration, repair, and assignment of space therein." 31 U.S.C. § 781(a).

bankruptcy judge sued to force GSA to provide more space for the performance of his duties. He lost. Votolato v. Freeman, 8 B.R. 766 (D.N.H. 1981).

An agency's space needs are subject to change over time as the agency grows or shrinks or acquires or sheds functions. A recurring question has been who must bear the expense when substantial growth by one agency requires the relocation of another agency which shares the building. GAO originally took the position that the moving agency must bear its own expenses. E.g., 35 Comp. Gen. 701 (1956); 34 Comp. Gen. 454 (1955). Subsequently, GSA adopted 41 C.F.R. § 101-21.601(b), which provides:

> "Federal agencies that require relocation of other agencies because of expanding space needs are responsible for funding."

GAO revisited the issue in 56 Comp. Gen. 928 (1977), agreed with GSA, and overruled the prior line of cases. The 1977 decision was based on two primary considerations. First, in issuing the regulation, GSA was exercising its authority under the Federal Property Act, an exercise which merited deference unless it exceeded the bounds of GSA's statutory authority. Second, the prior decisions had employed a somewhat strained application of 31 U.S.C. § 1301(a), which restricts appropriations to their intended purposes. While it is true that agency A does not receive appropriations to pay for agency B's move, it is equally true that agency B is not moving for its own benefit. Thus, GAO concluded:

> "[W]e are now of the view that when one agency requires the relocation of another to meet its own space requirements, the relocation is done for the benefit of the requesting agency. . . . [T]he costs of the move must be considered necessary or incident to meeting the space needs of the requesting agency. Use of the requesting agency's appropriations would not, therefore, augment the appropriations of the displaced agency. In fact, to the extent the move and related renovations to accommodate the displaced agency are made due to the request of another agency, the costs thereof cannot be considered necessary to further the purposes of the displaced agency's appropriations." 56 Comp. Gen. at 933.

c. Alterations and Repairs

A provision of the Public Buildings Act, 40 U.S.C. § 603(a), gives GSA the authority to alter public buildings. If the total estimated expenditure exceeds $1,500,000, the alteration is subject to the prospectus approval requirement of 40 U.S.C. § 606(a). If the alteration requires the acquisition of land, the $1,500,000 applies to the combined cost of the alteration and acquisition. 40 U.S.C.

§ 603(b). Of course, an agency which is exempt from GSA's authority or which receives its own specific statutory authority may proceed accordingly. E.g., B-131887, August 27, 1957 (specific authority for Army to remodel military warehouse for an office building). The application of the prospectus requirement, or the existence of a comparable requirement, depends on the terms of the exempting legislation. For example, GAO's main headquarters building, although exempt from GSA's custody and control, remains subject to 40 U.S.C. § 606, although GAO rather than GSA would submit the prospectus. 31 U.S.C. § 781(a).

As a general proposition, GSA is responsible for providing normal space needs, including "space alterations, repairs, and improvements sufficient to meet the mission requirements of occupant agencies." 41 C.F.R. § 101-20.002-1. In addition, GSA is authorized to provide "special services not included in the standard level user charge on a reimbursable basis." 40 U.S.C. § 490(f)(6). These special services or "tenant changes" may include such things as alterations necessary for the installation of agency program equipment, or space adjustments requested by the tenant agency for its own convenience within already assigned space. 41 C.F.R. §§ 101-20.106(d), (e). Both types of alterations, normal space needs and special services, are financed from the Federal Buildings Fund established by 40 U.S.C. § 490(f). 41 C.F.R. § 101-21.501. GAO has been critical of "augmenting" the Fund by seeking reimbursement for items which should have been treated as normal space needs. The General Services Administration Should Improve the Management of Its Alterations and Major Repairs Program, GAO/LCD-79-310, 26-29 (July 17, 1979). Examples cited include such things as resurfacing a driveway entrance, installing sprinklers, and conducting a survey to confirm complaints of inadequate ventilation.

The distinction between normal space needs and special services is recognized in several decisions. E.g., 38 Comp. Gen. 758 (1959); 38 Comp. Gen. 588 (1959); 38 Comp. Gen. 193 (1958); B-122723, March 10, 1955. With respect to "special services," as these cases point out, it is not enough that GSA is authorized to do the work on a reimbursable basis. The tenant agency's appropriations must be legally available to make the reimbursement. See also 39 Comp. Gen. 723 (1960). In addition, as these cases also address, if the work amounts to a "public improvement," it is also necessary to satisfy the specific authorization requirement of 41 U.S.C. § 12.

Since the 1970s, Congress has made the reimbursement question easier by enacting a general provision annually along these lines:

> "Appropriations available to any department or agency during the current fiscal year for necessary expenses, including maintenance or operating expenses, shall also be available for payment to the General Services Administration for charges for space or services and those expenses of renovation and alteration of buildings and facilities which constitute public improvements performed in accordance with the Public Buildings Act of 1959 (73 Stat. 749), the Public Buildings Amendments of 1972 (87 Stat. 216), or other applicable law." Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 607, 108 Stat. 2382, 2417 (1994).

GSA does not seek prospectus approval on reimbursable alteration projects if the requesting agency certifies that its appropriations are available without regard to 40 U.S.C. § 606. 41 C.F.R. § 101-19.302. This permits some large projects to escape the oversight of the public works committees, but Congress has long been aware of GSA's practice. See Repairs and Alterations of Public Buildings by General Services Administration—Better Congressional Oversight and Control Is Possible, GAO/LCD-78-335, 23-25 (March 21, 1979).

d. Maintenance and Protective Services

Every government building requires custodial services and, in varying degrees, protective services. The Federal Buildings Fund is available "for real property management and related activities." 40 U.S.C. § 490(f)(2). GSA's annual appropriations language under the Federal Buildings Fund heading is more descriptive, providing funds, quoting from GSA's 1995 appropriation—

> "for necessary expenses of real property management and related activities not otherwise provided for, including operation, maintenance, and protection of Federally owned and leased buildings; . . . contractual services incident to cleaning or servicing buildings . . . ." Pub. L. No. 103-329, 108 Stat. at 2397 (1994).

GSA provides a standard level of cleaning services as part of the package for which the tenant agency pays rent. 41 C.F.R. § 101-21.301. Section 101-20.102 of the regulations details the cleaning and maintenance services included in the standard level. The objective is to provide service "equivalent to that normally furnished commercially in similar space." 41 C.F.R. § 101-20.002-1(c).

Prior to establishment of the Federal Buildings Fund, agencies could not reimburse GSA for security services because the funds were appropriated to GSA. 34 Comp. Gen. 42 (1954); B-139678, August 31, 1959. Now, the standard level package also includes protective and security services to the extent described in 41 C.F.R. § 101-20.103-1. Protective services above this standard level may be provided on a reimbursable basis under the "special services" authority of 40 U.S.C. § 490(f)(6). 41 C.F.R. § 101-20.103-2. Other aspects of GSA's authority to protect federal property are found in 40 U.S.C. §§ 318, 318b, and 318d. See generally B-105291, November 30, 1976 (internal memorandum).

Additional restrictions on the procurement of guard and custodial services may appear in the annual Treasury, Postal Service, and General Government Appropriation Acts, and they may vary from year to year. A provision in the 1995 act prohibits the obligation or expenditure of funds from the Federal Buildings Fund "for the procurement by contract of any guard, elevator operator, messenger or custodial services" if the procurement would result in the displacement of any GSA veterans preference employee, except for contracts with sheltered workshops employing the severely handicapped. Pub. L. No. 103-329, § 505, 108 Stat. at 2409.[107]

e. Utilities

Another indispensable element of building management is the provision of utility services such as electricity, natural gas, water, and telecommunications. The Federal Property and Administrative Services Act authorizes GSA to prescribe policies for the management of public utility services, subject to Office of Federal Procurement Policy regulations (40 U.S.C. § 481(a)(1)); procure and supply nonpersonal services for executive agencies (40 U.S.C. § 481(a)(3)); and represent its client agencies in negotiations with public utilities and in utility regulatory proceedings (40 U.S.C. § 481(a)(4)). Section 481(a) permits exemptions for the Defense Department when determined to be "in the best interests of national security." Another provision, not part of the Federal Property Act, authorizes GSA to "provide and operate public utility communications services serving one or more governmental activities, in and outside the District of Columbia, where . . . economical and in the interest of the Government." 40 U.S.C. § 295.

[107]The U.S. Code carries the current version as 40 U.S.C. § 490c.

This has been interpreted to include telecommunication services. See 66 Comp. Gen. 58 (1986); B-190142, February 22, 1978. In addition, utility services would certainly seem to be included in “real property management and related activities” for purposes of 40 U.S.C. § 490(f)(2).

Absent specific statutory authority[108] or a delegation from GSA, an agency is not authorized to procure utility services directly, especially in an area covered by a GSA contract. B-152142-O.M., September 17, 1963.

Multi-year utility contracts are authorized by 40 U.S.C. § 481(a)(3), which provides that “contracts for public utility services may be made for periods not exceeding ten years.” This provision was designed to save the government money by enabling it to take advantage of discounts available under long-term contracts. 62 Comp. Gen. 569, 572 (1983); 35 Comp. Gen. 220, 222-223 (1955).

Although the statute uses the term “public utility services,” it is not limited to the “traditional” regulated public utility. 62 Comp. Gen. 569 (statute applies to installment purchase contract with a non-tariffed supplier of telephone equipment); 45 Comp. Gen. 59 (1965). The governing factor is the “nature of the product or service provided and not the nature of the provider of the product or services.” 62 Comp. Gen. at 575. “[T]he Congress in its judgment determined to categorize the service rather than the contractor;” the statute applies to “services having public utility aspects.” 45 Comp. Gen. at 64. In any event, the statute clearly applies to the commonly understood types of “utility services”—telecommunications (62 Comp. Gen. 569), natural gas (45 Comp. Gen. 59),[109] and electric power (44 Comp. Gen. 683 (1965)).

While the multi-year authority of 40 U.S.C. § 481(a)(3) has been liberally applied, it is not unlimited. The statute is intended to

[108] E.g., 31 U.S.C. § 781(c)(2), authorizing GAO to contract for utility services for periods not to exceed 10 years “[t]o the extent that funds are otherwise available for obligation.”

[109] A 1990 decision, 70 Comp. Gen. 44, held that a procurement of natural gas was not a contract for utility services for purposes of the Walsh-Healey Act. That case distinguished 45 Comp. Gen. 59 on several grounds. 70 Comp. Gen. at 49.

address "incidental utility services needed in connection with authorized Government business," not any project that happens to involve utility services. 35 Comp. Gen. 220, 223 (1955). Thus, GAO has found it inapplicable to an Air Force early warning system (35 Comp. Gen. 220), and to a proposal to finance construction of power facilities on the Ryukyu Islands (B-159559, July 29, 1966).

GAO subsequently approved a proposal in the Ryukyu case for privately financed construction, with the government entering into a 10-year requirements contract with a renewal option and a guarantee provision. B-159559, June 19, 1967. The obvious purpose of the guarantee feature was to enable the utility to recover its capital cost. See also 37 Comp. Gen. 155, 159-160 (1957); 17 Comp. Gen. 126 (1937); 16 Comp. Gen. 136 (1936); 8 Comp. Gen. 654 (1929). While this type of arrangement is acceptable, a scheme which obligates the government to pay the contractor's entire capital cost at the outset violates the advance payment prohibition in 31 U.S.C. § 3324(b). 57 Comp. Gen. 89 (1977); 58 Comp. Gen. 29 (1978).

Contracts under 40 U.S.C. § 481(a)(3) are incrementally funded. The contracting agency is not required to obligate the total estimated contract cost in the first year. It needs only sufficient budget authority at the time the contract is made to obligate the first year's costs, with subsequent years obligated annually thereafter. 62 Comp. Gen. 569, 572 (1983). See also 44 Comp. Gen. 683, 688 (1965); 35 Comp. Gen. 220, 223 (1955). GSA pays utility invoices by using a combination of statistical sampling and fast pay procedures. See 67 Comp. Gen. 194 (1988) and 68 Comp. Gen. 618 (1989) for a detailed discussion.

A contract for a term of 10 years with an option to renew for an additional 5 years is within the authority of 40 U.S.C. § 481(a)(3) because the government is not obligated beyond the initial 10-year period. B-227850, October 21, 1987, aff'd on recons., B-227850.2, March 22, 1988.

Except for telecommunication services, utilities are financed from the Federal Buildings Fund and are part of the "space and services" package for which federal agencies pay rent. Telecommunication services are financed from a separate fund established by 40 U.S.C. § 757. Originally designated the Federal Telecommunications Fund, it was merged in 1987 with an automatic data processing fund and redesignated as the Information Technology Fund. See 69 Comp. Gen. 112, 113 (1989). The Fund is available for

> "expenses . . . and for procurement (by lease, purchase, transfer, or otherwise) for efficiently providing information technology resources to Federal agencies and for the efficient management, coordination, operation, and utilization of such resources." 40 U.S.C. § 757(b)(2).[110]

This, like the Federal Buildings Fund, is a revolving fund.

Prior to enactment of the Clinger-Cohen Act of 1996,[111] Pub. L. No. 104-106, Div. D,E, 110 Stat. 186 (1996), GSA had exclusive authority to provide "Automatic Data Processing" equipment and services (including telecommunications services) under the Brooks Automatic Data Processing Act. 40 U.S.C. § 759 (1994). Pursuant to this authority, GSA promulgated the Federal Information Resources Management Regulation (FIRMR), which governed "the umbrella of local and long distance telecommunications services . . . provided, operated, managed, or maintained by GSA for the common use of all Federal agencies and other authorized users." 41 C.F.R. § 201-4.001 (1995). The Comptroller General had several occasions to interpret GSA's authority under the Brooks ADP Act. See, e.g., 65 Comp. Gen. 380 (1986) (FIRMR applicability); 69 Comp. Gen. 112 (1989) (statistical sampling cost recovery); 70 Comp. Gen. 238 (1991) (termination charges).

The Clinger-Cohen Act of 1996 repealed the Brooks ADP Act. Pub. L. No. 104-106, § 5101, 110 Stat. 680. GSA abolished the FIRMR in August 1996. The regulatory scheme of the FIRMR was replaced with directives and guidance governing "Information Technology," which includes telecommunications services. See, e.g., OMB Circular A-130, "Management of Federal Information Resources"; Exec. Order No. 13011, "Federal Information Technology," July 16, 1996; 48 C.F.R. Part 39, "Acquisition of Information Technology" (1999) (FAR). GSA, however, continues to provide governmentwide telecommunications services through contracts which federal

[110]It is perhaps not intuitively obvious that the term "information technology resources" includes telephone services, but the origin and evolution of 40 U.S.C. § 757 remove any doubt.

[111]So renamed by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Tit. 8, 5808, 110 Stat. 3009 (1996).

agencies, on a nonmandatory basis, may use to satisfy their telecommunications needs. Examples include GSA's FTS 2001 contracts and the Metropolitan Area Acquisitions (MAA) program.

f. Use Restrictions

The Property Clause of the Constitution (art. IV, § 3) empowers Congress to "make all needful Rules and regulations" with respect to government-owned property. Congress has delegated that authority to GSA in 40 U.S.C. § 318a. Many of GSA's regulations address issues of access to, and personal conduct on government property. For example, they specify when government property will be open and closed to the public (41 C.F.R. § 101-20.302), and ban certain activities while on federal property—such as gambling (41 C.F.R. § 101-20.306) and consumption of alcoholic beverages (41 C.F.R. § 101-20.307), etc.

Congress also has the authority to control what use is made of government property. In addition to the general purpose restrictions which permeate appropriations law (see chap. 4 above), a few restrictions on the use of government property appear in various parts of title 40 and are not reflected elsewhere. One example is 40 U.S.C. § 31, which prohibits the use of any public building in the District of Columbia, except the Capitol Building and the White House, for any "public function" unless expressly authorized by law. Another is 40 U.S.C. § 286:

> "[N]o building owned, or used for public purposes, by the Government of the United States, shall be draped in mourning and no part of the public fund shall be used for such purpose."

This prohibition applies to buildings abroad as well as to buildings in the United States, and applies regardless of who owns the building. 8 Comp. Dec. 317 (1901-A.D.); 7876, September 20, 1923.

g. Payment of Rent by Federal Agencies

In 1972, Congress made fundamental changes in the way the government budgets for and finances its space needs. Prior to that time, the system was fairly simple: Congress, for the most part, appropriated the money to GSA and GSA paid the bills. Under this system, there was little incentive for agencies to be conservative in their space needs. Also, as we have seen, coming up with appropriations to fund needed construction work proved to be extremely difficult.

The Public Buildings Amendments of 1972 made several important revisions to the Federal Property and Administrative Services Act. First, the 1972 law created a new revolving fund, later named the Federal Buildings Fund, to be available to the extent provided in annual appropriation acts, for GSA to use to finance its real property management functions. Next, it required agencies to pay rent to GSA, to be deposited in the revolving fund. Finally, it authorized any executive agency other than GSA which provides space and services to charge for the space and services.[112] While the concept of charging rent was not wholly unknown prior to 1972 (see, e.g., 28 Comp. Gen. 221 (1948)), this was the first governmentwide requirement.

The pertinent portions of 40 U.S.C. §§ 490(j) and (k) are quoted below:

> "[(j)] The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services . . . . The Administrator may exempt anyone from the charges required by this subsection if he determines that such charges would be infeasible or impractical. . . ."

> "[(k)] Any executive agency, other than [GSA], which provides to anyone space and services set forth in subsection (j) of this section, is authorized to charge the occupant for such space and services at rates approved by the Administrator. . . ."

Subsection (f)(1)(A) of 40 U.S.C. § 490 directs that user charges under subsection (j) be deposited in the Federal Buildings Fund. The unquoted portion of subsection (k) authorizes the agency to credit the receipts to its own appropriations to the extent of recovering the cost of providing the services. Section 7 of the Public Buildings Amendments of 1972, uncodified but found as a note following 40 U.S.C. § 603, requires that rates established under 40 U.S.C. §§ 490(j) and (k) be approved by the Office of Management and Budget. Agency operating appropriations are available to pay the rent by virtue of a recurring general provision appearing in

[112]Pub. L. No. 92-313, §§ 3 and 4, 86 Stat. 216, 218-219 (1972), 40 U.S.C. §§ 490(f) (Federal Buildings Fund); 490(j) (payment of rent to GSA); and 490(k) (authority of other agencies to charge for space and services).

Treasury-Postal Service appropriation acts, quoted in full under the Alterations and Repairs heading earlier in this chapter.

At first, the space-and-service charges were known as the "standard level user charge" or "SLUC." They are now simply called "rent." The rent requirement is intended to reduce cost and encourage more efficient space utilization by making agencies accountable for the space they use. H.R. Rep. No. 92-989, reprinted in 1972 U.S.C.C.A.N. 2370, 2373. Rent under subsection (j) is to be based on "approximate commercial charges for comparable space and services." This method was chosen over a cost-recovery basis in order to produce more income so that the revolving fund could finance construction and major repairs. See B-95136, May 18, 1971, GAO's comments on the legislation. This hope has gone largely unmaterialized.[113] Under the commercial charge formulation, it is not inconceivable that an agency occupying space in a leased building could pay more rent to GSA than GSA is paying to the lessor. This does not entitle the lessor to a rent increase. See B-95136-O.M., March 29, 1976.

GSA defines "rent" in simple terms as "the rate charged for GSA-controlled space." 41 C.F.R. § 101-21.003-2. Rent is based on appraisals performed at 5-year intervals and updated in the intervening years by changes in the Consumer Price Index. 41 C.F.R. § 101-21.201(a). According to an early GSA statement, rent is designed to cover

> "the value of the space itself plus cleaning, utilities, operation and maintenance of elevators and electric heating, air-conditioning, ventilating, refrigeration, plumbing and sewage systems, repairs and maintenance, including approaches, sidewalks and roads; the furnishing and maintenance of building equipment such as directory and bulletin boards, electrical outlets, door keys, and window shades or venetian blinds; and overhead (i.e., the total cost of GSA's Public Buildings Service . . . except costs covered by reimbursements)." 52 Comp. Gen. 957, 958-959 (1973).

The services GSA provides as part of the rent do not mean any and all services the tenant agency may need or want. GSA provides what it determines to be a "standard level" of service. 41 C.F.R. § 101-21.003-3. Over and above that standard level, services are

[113] See Chapter 1 of The General Services Administration's Rental Rates (Standard Level User Charge) for Federal Agencies, GAO/LCD-78-329 (May 25, 1978) and Chapter 3 of Federal Office Space: Increased Ownership Would Result in Significant Savings, GAO/GGD-90-11 (December 1989).

provided on a reimbursable basis to the extent that GSA is authorized to do the work or provide the service and the tenant agency's appropriations are available to pay.

The law authorizes GSA to charge rent to "anyone" furnished space or services, not just other federal agencies. Thus, for example, GSA was authorized to charge rent to the National Association of Regulatory Utility Commissioners, to which 49 U.S.C. § 10344(f) then required GSA to furnish space. B-95136, November 17, 1978. As the result of some apparently skillful lobbying, the law was changed in 1980 to require the Interstate Commerce Commission (i.e., the taxpayers) to pick up the tab. Pub. L. No. 96-296, § 36, 94 Stat. 793, 826 (1980).

A federal office building may house a variety of support concessions such as blind vending stands operated under the Randolph-Sheppard Act, Federal Credit Unions, cafeterias, dry cleaning and laundry facilities, etc. Since GSA can charge "anyone," GSA could presumably charge rent directly to the concessioners. Instead, however, GSA assigns the space for these support concessions to the tenant agency for purposes of rent assessment, on the theory that the agency's presence in the building generated the need for the space. GAO has agreed that this method is authorized. 52 Comp. Gen. 957 (1973); B-114820-O.M., December 14, 1977. GSA has "wide discretionary powers consistent with the purposes of the statute, in the manner of defining and charging for space occupied by Federal agencies and others." 52 Comp. Gen. at 961. If the building houses more than one government agency, GSA allocates the joint-use space (and the rent for it) on a pro rata basis. 41 C.F.R. § 101-21.202.

GSA's rental charge also covers assigned parking spaces. Once again, since GSA can charge "anyone," it could assign spaces directly to individuals and charge rent to those individuals. In the exercise of its discretion, however, GSA simply includes the parking space in the total space charged to the tenant agency or agencies. See 52 Comp. Gen. at 960-961; 55 Comp. Gen. 897 (1976). See also American Federation of Government Employees v. Freeman, 498 F. Supp. 651, 656-657 (D.D.C. 1980) (40 U.S.C. § 490(j) authorizes, but does not require, GSA to charge parking fees). We noted above that

40 U.S.C. § 490(j) uses the term "anyone." So does 40 U.S.C. § 490(k).[114] Therefore, the tenant agency could charge its employees for parking space, but the rates would have to be approved by GSA and OMB. 55 Comp. Gen. at 899-900. However, subsection (k) does not authorize an agency to collect (and retain) fees from non-agency participants in an agency-sponsored conference held in procured space. The agency is the "occupant" within the meaning of 40 U.S.C. § 490(k), not the participants. B-190244, November 28, 1977. (This does not mean that the agency cannot charge a fee, merely that it cannot rely on 40 U.S.C. § 490(k) as authority to credit the money to its own appropriation.)

The purpose of 40 U.S.C. § 490(j) is to raise revenue for GSA, not to create the full equivalent of a commercial landlord-tenant relationship. Accordingly, a tenant agency may not reduce its rental payments to recover the cost of property damaged by building failures. 59 Comp. Gen. 515 (1980); 57 Comp. Gen. 130 (1977).

Congress often uses appropriation act provisions to address either GSA's authority under 40 U.S.C. § 490(j) or the extent of an agency's liability to pay GSA's charges. Thus, to understand the operation of the statute for any given year, it is necessary to examine both the Treasury-Postal Service appropriation act for any provisions directed at GSA and the appropriation act covering the tenant agency in question. For example, a provision in GSA's 1995 appropriation directs GSA to reflect in its rent rates the reductions contained in a particular budget amendment. Pub. L. No. 103-329, GSA General Provisions § 5, 108 Stat. 2382, 2404 (1994).

Restrictions directed at tenant agencies may take various forms. A provision imposing a specific dollar limit is discussed in B-204270, October 13, 1981. A provision imposing a percentage limitation is noted in 55 Comp. Gen. 897 (1976). Two additional types appear in the 1995 Labor-Health and Human Services Appropriations Act, Pub. L. No. 103-333, 108 Stat. 2539 (1994). Section 207 of the HHS general provisions, 108 Stat. at 2561, permanently cancels a specific dollar amount of "budgetary resources available . . . for space rental charges" in 1995, and directs HHS to allocate the reduction among

[114]There is one significant difference. Subsection (j) requires GSA to charge rent; subsection (k) merely authorizes other agencies to do so.

its various accounts with certain exceptions. The operating appropriation for the Railroad Retirement Board, 108 Stat. at 2571, specifies that none of the funds shall be available to pay charges under 40 U.S.C. § 490(j). The precise language of the limitation will determine whether it applies only to rent or to other reimbursements as well. B-186818, September 22, 1976. Regardless of the type of limitation, it must appear in the statute, and not merely in committee reports, in order to be legally binding. Id.; B-177610, September 3, 1976.

G. Improvements to Property Not Owned By the Government

1. The Rules

The topic of this section is the rule that, unless authorized by statute, appropriated funds may not be used to make permanent improvements to property not owned by the federal government. As numerous decisions have pointed out, the rule is based on the fundamental tenet, noted in various places throughout this book, that no government official is authorized to give away government property—tangible property, money, legal rights—without specific statutory authority. E.g., 53 Comp. Gen. 351, 352 (1973); 42 Comp. Gen. 480, 481 (1963); 35 Comp. Gen. 715, 716 (1956).

Although derived from the constitutional principle that disposal of government property is a function of Congress, the rule itself is decisional rather than statutory, or, to quote a phrase used regularly in the decisions, the rule "is one of policy and not of positive law." 53 Comp. Gen. at 352; 42 Comp. Gen. at 483. Stated somewhat more accurately in 65 Comp. Gen. 722, 724 (1986), the rule is "one of public policy, not statutory prohibition." The public policy which the rule reflects—that it is ordinarily not a particularly good idea for government officials to give away the taxpayers' money—can be traced back at least to the early decisions of the Comptroller of the Treasury. E.g., 6 Comp. Dec. 295 (1899).

Due at least in part to the lack of an explicit statutory foundation, the rule is not and never has been particularly rigid. A considerable body of exceptions has evolved, in recognition of the fact that there are situations in which making improvements to nongovernment property is appropriate to the circumstances and can be justified. Viewing the body of case law as a whole, it seems fair to say that there is a set of standards to determine when the expenditure may be authorized, with the prohibitory rule remaining for those cases in which the expenditure would amount to giving away government property.

To start with, the rule applies to <u>permanent</u> improvements. It does not prohibit temporary improvements as long as they remain the property of the government and the government reserves the right to remove them at the expiration of the lease or other government use. 43 Comp. Gen. 738 (1964); 20 Comp. Gen. 927 (1941); 15 Comp. Gen. 761 (1936). For example, the 1964 decision concerned nonpermanent servicing facilities which the General Services Administration needed to install in commercial space leased for motor pool activities. The propriety of temporary improvements is determined by applying the standard rules of purpose availability—you look first to see if the expenditure is expressly authorized by law; if it is neither expressly authorized nor expressly prohibited, you then apply the “necessary expense” doctrine discussed in Chapter 4.

If the contemplated improvement is permanent, the first step is still to look for specific statutory authority. If it does not exist, the expenditure may nevertheless be authorized if the following tests are met:

- The improvement must be incident to and essential for the effective accomplishment of an authorized purpose of the appropriation sought to be charged.
- The amount of the expenditure must be reasonable.
- The improvement must be for the principal benefit of the government.
- The interests of the government in the improvement must be protected.

These standards appear to have been first enunciated in 42 Comp. Gen. 480, 484 (1963), and have been reiterated in many cases since. <u>E.g.</u>, 71 Comp. Gen. 4, 5 (1991); 69 Comp. Gen. 673, 675 (1990); 53 Comp. Gen. 351, 352 (1973); 46 Comp. Gen. 25, 27 (1966).

The first test—incident and essential to an authorized purpose of the appropriation—is a relative concept, like the "necessary expense" doctrine from which it is derived. It is applied by evaluating the proposed expenditure against the authorized purposes of the appropriation. Thus, incidental improvements to private property, chargeable to project funds, are unobjectionable if necessary to the completion of an authorized federal project. B-37747, November 19, 1943; A-65186, October 19, 1935.

As with the necessary expense doctrine itself, an item may relate clearly to one appropriation but be totally foreign to another. A good illustration is the improvement involved in 42 Comp. Gen. 480—monkey cages in the San Diego zoo. It's hard to see how the construction of monkey cages in a private zoo would further the purposes of a federal agency's appropriation.[115] However, where the appropriation is for Public Health research and the expenditure stems from a cost-reimbursable contract for the experimental breeding of primates, the relationship of the monkey cages to the appropriation takes on a new perspective. This element shares the common-sense logic of the necessary expense doctrine. However wonderful an item may appear, if it does not bear a sufficient relationship to carrying out one of the agency's authorized programs or functions or to fulfilling the purposes for which Congress appropriated money to the agency, the agency has no business doing it.

The second element—reasonableness of cost—is also relative. It is not enough to just look at the dollar amount in a vacuum. You must evaluate the cost against such factors as the type of improvement involved, the uses to which it is to be put, and the length of the government's contemplated use measured against the residual value, if any, to the owner. This element has been stated in various ways. The cost of the improvements must not be "extravagant or disproportionate to the needs to which the facilities are intended to be put." 35 Comp. Gen. 715, 716 (1956). If a lease or contract is

[115]It should be apparent that we are talking about expenditures which are incident to some other government program or project, as distinguished from grant programs where making the improvement may be the very purpose of the federal assistance. Since the grant programs are statutorily authorized, this analysis would not apply, although the underlying rationale would bar the expenditure, but for the statute.

involved, the cost of the improvements must be "in reasonable proportion to the overall cost of the lease or contract price." 53 Comp. Gen. 351, 352 (1973). The monkey cages in 42 Comp. Gen. 480, for example, cost approximately 10 percent of the total price of the research contract. Of course, this formulation is useless where land is being leased to the government for a nominal rent, in which case other factors must be used to assess reasonableness. Thus, spending approximately $1,000 to improve an access road was "relatively small and not disproportionate to the needs of the Government," and therefore acceptable, in 38 Comp. Gen. 143, 146 (1958), whereas in 47 Comp. Gen. 61, 65 (1967), constructing a $25 million building on land leased to the government was a different story, hardly qualifying as "some minor item incidental to a larger purpose."

For at least the last half century, the amount formula included a statutory element. As noted previously under the Leasing heading, section 322 of the Economy Act of 1932 prohibited the obligation or expenditure of appropriated funds for "alterations, improvements, and repairs" of rented premises in excess of 25 percent of the first year's rent. The statute was repealed in 1988 and the cases must therefore be regarded as modified to the extent they either impose a percentage limitation on the amount of otherwise authorized expenditures or treat the Economy Act as an independent source of authority.

The third element—principal benefit of government—is largely self-explanatory and is necessary to prevent giveaways. Of course, words like "principal" or "primary" do not mean "exclusive," and in many cases there will be some residual, if not contemporaneous, benefit to the owner. Thus, an otherwise authorized expenditure does not become objectionable merely because the facility will have an estimated life of 15 years and the government plans to use it for only 10 years. See B-130515(3), May 8, 1969. Or, turning again to the monkey cages in 42 Comp. Gen. 480, nothing would prevent the zoo from cleaning them out and using them to house other monkeys upon completion of the government research contract. Nevertheless, the United States must be the primary beneficiary of the improvements. E.g., B-213379, October 29, 1984 (no authority to pay railroad in Germany for track improvements where benefit to United States was merely "the unavoidable result of improvements made to the German rail system as a whole").

The fourth and final element—protection of the government's interests—will again vary with the facts and circumstances of the particular case. For example, in a case where the Immigration and Naturalization Service wanted to erect or repair fences on private land to help deter the entry of illegal aliens, it would be necessary for the INS to gain "substantial control" over the land by some device such as an easement or lease covering the useful life of the fence. 55 Comp. Gen. 872, 874 (1976). See also A-65186, October 19, 1935, specifying the same condition. Similarly, where the Department of Agriculture wanted to construct a dam, part of which would have to be located on Canadian soil, GAO advised that a right in perpetuity for the construction and maintenance of the dam should first be obtained from the property owner, as well as, of course, the consent of the Canadian government. 18 Comp. Gen. 463 (1938). In some cases, the appropriate device for protecting the government's interests may be the insertion of appropriate provisions in a contract. E.g., B-187482, February 17, 1977. In other cases, it may be necessary to work out an ad hoc agreement with the owner tailored to the circumstances. See 71 Comp. Gen. 4, 6 (1991).

If these tests cannot be satisfied, then the expenditure is unauthorized unless the agency obtains statutory authority. For example, in B-194031, May 1, 1979, GAO agreed with the former Veterans Administration that it could not use its funds for the repair and maintenance of the Congressional Cemetery in Washington, D.C., a 30-acre cemetery of which the government owned only half an acre. The expenditure would primarily benefit the private owners and would be disproportionately large in relation to the government-owned portion. Significantly, on a few occasions in the past when Congress had authorized repairs, it did so explicitly. The VA could, of course, repair and maintain the government-owned plots.

2. Some Specific Applications

a. Leased Premises/Property

The rule prohibiting permanent improvements to nonfederal property without statutory authority applies to leased property, both unimproved property[116] and buildings.[117] However, the rule has evolved somewhat differently in the case of leases because of the contractual nature of the transaction. It has long been held that appropriated funds are available for improvements to property being leased by the government if provided for as part of the consideration under the lease. 65 Comp. Gen. 722, 723-724 (1986); 18 Comp. Dec. 70 (1911); 6 Comp. Dec. 943 (1900); A-33513, October 10, 1930. Any other rule would make little sense because alterations are often necessary to make premises suitable for the government's proposed use, and if the government couldn't pay directly, the landlord could make the alterations and factor the cost into the rent, and the government would end up paying anyway. Of course, there is a common-sense point beyond which this concept cannot be stretched. It would not, for example, permit the construction of a $25 million building on land being leased for a dollar a year. See 47 Comp. Gen. 61 (1967).

As noted in our general discussion, the prohibition does not apply with respect to alterations or improvements to the leased premises which are not permanent and which are removable. 43 Comp. Gen. 738 (1964); 5 Comp. Gen. 696 (1926); B-127807, May 14, 1956; A-55493, June 21, 1934; A-54725, April 13, 1934. In the case of a lease, however, before applying the purpose analysis, it is first necessary to ask whether the repair or improvement is one which the landlord is obligated to supply under the terms of the lease. 5 Comp. Gen. at 697. If it is, then the government is not authorized to, in effect, pay twice to get what it is entitled to get under the lease. 2 Comp. Gen. 606, 607 (1923); A-50554, August 28, 1933.[118]

The General Services Administration has its own statutory authority, discussed generally in 65 Comp. Gen. 722 (1986). Under section 210(a)(8) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 490(a)(8), with respect to any

[116] 47 Comp. Gen. 61 (1967); 38 Comp. Gen. 143 (1958); 35 Comp. Gen. 715 (1956).

[117] 18 Comp. Gen. 144 (1938); 14 Comp. Gen. 97 (1934); 10 Comp. Gen. 149 (1930); 5 Comp. Dec. 478 (1899).

[118] We are somewhat reluctant to admit it, but this case involved an expenditure of $2.67 for the purchase of a toilet seat. Despite overwhelming temptations, we will eschew further comment.

"building, property, or grounds" under GSA's jurisdiction, GSA is authorized to "repair, alter, and improve rented premises" if it determines that the work "is advantageous to the Government in terms of economy, efficiency, or national security." The total cost over the expected life of the lease must be less than the cost of alternative space which does not need the work. Id. Work under 40 U.S.C. § 490(a)(8) is financed from the Federal Buildings Fund, 40 U.S.C. § 490(f).

If an agency other than GSA is doing the leasing under its own authority, what it can or cannot do will depend on the precise terms of its leasing authority, supplemented or restricted, as the case may be, by the decisions.

What happens to the improvements at the end of the lease, and related questions of liability, will depend on the terms of the lease. In one case, for example, the government had leased unimproved land for 10 years and constructed buildings on it. When the lease was over, the government removed the buildings and left the concrete foundations. Unfortunately for the landowner, the lease expressly relieved the government of any responsibility to restore the land to its prior condition, and the court refused to construe this in "all or nothing" terms. M.H. Sherman Co. v. United States, 258 F.2d 881 (9th Cir. 1958). In a similar case where the lease did include the "restore to prior condition" clause, the government was liable. Atlantic Coast Line R.R. v. United States, 129 Ct. Cl. 137 (1954).

The restoration clause is not a rigid requirement that the government remove improvements in any event and at all costs. Thus, in a case where removal would not have been cost-effective, the Attorney General approved a settlement whereby the government agreed to leave the improvements for the use of the lessor in full settlement of all claims against the government. 39 Op. Att'y Gen. 338 (1939). There can be no requirement "that improvements attached to leased premises must be removed when removal would involve the expenditure of public funds greatly in excess of any salvage value." Id. at 340. See also 20 Comp. Gen. 105, 111 (1940).

The restoration clause serves more as a method of measuring damages where the government does not remove the improvements. Whatever the government does or does not do, liability requires provable damages. The point is illustrated in Realty Associates v. United States, 138 F. Supp. 875 (Ct. Cl. 1956), in which the government leased land and buildings which had been idle for several years and made substantial improvements to the property. When the lease was over and the property returned to the lessor, it had so increased in value as a result of the improvements that it was capable of producing, and did produce, substantial income. Nevertheless, the lessor sued for the cost of restoration on a breach of contract theory. Noting that if the government had restored the property to its former unusable condition, "no one would have been more unhappy than plaintiff" (id. at 877), and invoking Mark Twain's aphorism that "the difference between a dog and a man is that if you pick up a starving dog and make him prosperous he will not bite you" (id. at 878), the court held that the lessor could recover only if he could show that he actually suffered damage as a result of the government's actions. If the property is worth more in its unrestored condition than it would be worth if restored, there is no damage. See also Dodge Street Building Corp. v. United States, 341 F.2d 641 (Ct. Cl. 1965). This principle has also been applied where the leasehold was acquired by condemnation. Flood v. United States, 274 F.2d 483 (9th Cir. 1960), cert. denied, 363 U.S. 805.

The fact that removal may not be feasible or cost-effective does not mean that the government has no alternative to simply giving away the improvements. GAO has recommended that the leasing agency consider, in appropriate cases,

> "the advisability of incorporating in such leases a provision for reimbursement by the lessor of the residual value of such changes at the termination of the lease together with the basis for determining such value. . . . In determining the residual value there necessarily would be for consideration such factors as (1) the rental rate, (2) the lease term, and (3) the type of the alteration, improvement, or repair with particular consideration as to whether or not such building changes at the termination of the lease will operate to enhance the value of the building or be advantageous to the lessor." 39 Comp. Gen. 304, 307 (1959).

The lease in that case was subject to termination by the lessor at the end of each annual renewal term, a situation in which a provision along the lines suggested is particularly desirable. Id.

b. Research

A number of government agencies have research responsibilities not infrequently involving atypical situations with atypical needs. Thus, it probably should not be too surprising that some years ago GAO noted that a common source of exceptions was “improvements (to a contractor’s property) incidental to but necessary to give full force and effect to research contracts made by the Government with private parties.” 53 Comp. Gen. 351, 352 (1973).

One case, which we have already noted, is 42 Comp. Gen. 480 (1963). The Public Health Service’s National Cancer Institute had entered into a research contract with the San Diego Zoo. Part of the contract involved the installation of cages and related work for the “experimental breeding of primates.” GAO evaluated the administrative justification in light of the rule and its exceptions, and found the expenditure authorized. This holding was applied a few years later in another case involving a Public Health Service cancer research contract, 46 Comp. Gen. 25 (1966), allowing the costs incurred by the contractor in converting an unfinished basement into laboratory space for use in performing the contract. Part of the justification was a response to the logical question of why the agency had chosen this contractor rather than one who might have had more suitable facilities.

To avoid the difficult questions cases like these presented, GAO suggested that the Public Health Service might be better off with more explicit statutory authority, noting as a model 10 U.S.C. § 2353. 42 Comp. Gen. at 486. Under 10 U.S.C. § 2353, the military departments may fund the acquisition or construction of facilities and equipment deemed necessary for the performance of research contracts, but this may not include “new construction or improvements having general utility.” In addition, the statute prohibits the installation or construction of facilities “that would not be readily removable or separable without unreasonable expense or unreasonable loss of value” unless the contract includes specified safeguards. 10 U.S.C. § 2353(b). This statute clearly overcomes the “permanent improvement” prohibition. B-138868-O.M., June 10, 1959. The Public Health Service took the hint, and now has the explicit authority to enter into research contracts in accordance with 10 U.S.C. § 2353. 42 U.S.C. § 241(a)(7).

Another case involving an exception made for a research project improvement is B-96826-O.M., February 8, 1967. It involved an irrigation system constructed on unimproved land by the Soil Conservation Service in connection with statutorily authorized soil erosion research. As with the Public Health Service cases, this too would now be authorized by statute. Under 7 U.S.C. § 2250a, Department of Agriculture appropriations may be used to erect buildings or other structures on land owned by someone other than the United States, as long as the government obtains the right to use the land for. the estimated life of or need for the structure, including the right to remove the structure upon termination of government use.

Another agency with research responsibilities is the National Institute of Standards and Technology. GAO considered a number of proposals in the 1950s, concluding in several cases that the Institute could make improvements to leased property where those improvements were essential to carrying out the particular projects and could be removed without material damage to the premises. E.g., B-122439, February 23, 1955 (unimproved land); B-114240, May 8, 1953 (laboratory alteration). Nevertheless, statutory authority is preferable to case-by-case determinations, and legislation was enacted in 1958, now found at 15 U.S.C. § 278e(g), which authorizes the Secretary of Commerce to erect on leased property facilities needed by the Institute.

As this survey of cases suggests, a number of agencies with significant research responsibilities now have adequate statutory authority, with appropriate safeguards (except for 15 U.S.C. § 278e(g), which includes no apparent safeguards), to do what they need to do.

The Environmental Protection Agency presented a somewhat different situation in B-187482, February 17, 1977. In connection with authorized research under the Federal Water Pollution Control Act, EPA wanted to purchase a cooling tower from a private power company, knowing that it would abandon the facility in a few years upon completion of the research. EPA thought the situation was analogous to spending money for permanent improvements to private property. GAO agreed and applied the tests of 42 Comp. Gen. 480, finding, among other things, that the purchase price would amount to approximately 25 percent of the total cost of the research project, that constructing a new tower would have been considerably more expensive, and that the agreement included appropriate safeguards to protect the government's interest in the tower. Accordingly, the purchase was authorized.

c. Public Improvements

By "public improvements" we mean such things as roads and sidewalks. By their nature, when not located on federal property, they tend to be located on land owned by state or local governments rather than private parties. This introduces different factors into the analysis.

Most of the cases involve proposals to construct, repair, or maintain roads leading or adjacent to some government facility. The earlier cases just said "no," the fact that there would be some resulting benefit to the government being irrelevant. E.g., 6 Comp. Gen. 353 (1926); 2 Comp. Gen. 308 (1922). Later cases found a basis to say "no" in a statute we have discussed earlier in this chapter, 41 U.S.C. § 12, which prohibits any contract "for the erection, repair, or furnishing of any . . . public improvement" in excess of the amount "appropriated for the specific purpose." 39 Comp. Gen. 388 (1959) (access road); 32 Comp. Gen. 296 (1952) (deceleration lane on state highway); B-143536, August 15, 1960 (access road). The statement found almost verbatim in each case is, quoting from B-143536:

> "[I]f specific action is required by the Congress with respect to public improvements on Federal property, a fortiori, specific authority would be required for the financing from Federal funds of public improvements on State or county property."

Other cases applying this concept include B-211044, June 15, 1984 (crosswalk across the median strip of a public highway); and B-194135(1), November 19, 1979 (locally owned wastewater treatment plant). In 38 Comp. Gen. 143 (1958), however, improvements to an access road on state land were found authorized under the decisional rules where most of the contemplated improvements were not of a permanent nature and there would be no resulting benefit to the state since the road was no more than a car path leading to the government facility across grazing land. See also B-126950, March 12, 1956 (similar facts, same result).[119]

The prohibition has also been applied in a case where the government technically held fee title extending to the center of a

[119] A factual distinction which did not affect the result is that the rent being paid by the government in 38 Comp. Gen. 143 was nominal whereas in B-126950 it was more of a market rent.

public street, but had no jurisdiction or control over the portion occupied by the street because it was subject to a permanent easement held by the city in trust for the public. B-120012, October 15, 1954.

In the case of sidewalks, there is statutory authority for any executive agency "to install, repair, and replace sidewalks around public buildings, installations, properties, or grounds under the control of such agency and owned by the United States," either directly or by reimbursement to the state or local government, in accordance with regulations of the General Services Administration. 40 U.S.C. § 490(i). Prior to the enactment of this general authority, some agencies had—and still have—their own comparable agency-specific authority. An example is 16 U.S.C. § 555b for the Forest Service. GAO has construed "owned" for purposes of the Forest Service provision as including a 99-year lease. 43 Comp. Gen. 705 (1964). There is no reason why this holding should not apply as well to 40 U.S.C. § 490(i).

Subsection (4) of 40 U.S.C. § 490(i) provides that the statute should not be construed to "increase or enlarge the tort liability of the United States . . . beyond such liability presently existing by virtue of any other law." This of course means primarily the Federal Tort Claims Act. Thus, reimbursement by the federal government under section 490(i) does not operate to relieve the state or local government from any underlying obligation it might otherwise have to make the repairs, or from liability for failure to do so. Connor v. United States, 461 F.2d 1259 (D.C. Cir. 1972) (slip-and-fall on a sidewalk adjacent to a federal building in the District of Columbia).

d. Federal Aviation Administration

The Federal Aviation Administration performs its functions at airports throughout the country and therefore has considerable presence on property which is not owned by the United States. Consequently, the FAA has had frequent occasion to consider the use of its appropriations for various alterations or improvements to nongovernment property.

The FAA has general authority to "acquire, establish, improve, operate, and maintain air navigation facilities." 49 U.S.C. § 44502(a)(1). Under this authority, it could, for example, make repairs and improvements to flight service stations located on premises leased from airport owners or operators. 53 Comp.

Gen. 317 (1973).[120] See also B-143536, August 15, 1960 (similar language in an appropriation act provision applicable to leased as well as acquired lands).

Under another statute, the FAA may approve an airport development grant application only upon receipt of written assurances that—

> "the airport owner or operator will provide, without charge to the Government, property interests of the sponsor in land or water areas or buildings that the Secretary decides are desirable for, and that will be used for, constructing at Government expense, facilities for carrying out activities related to air traffic control or navigation." 49 U.S.C. § 47107(a)(12).

This is also specific authority sufficient to overcome the prohibition on improving non-government property. 46 Comp. Gen. 60 (1966). That case found FAA appropriations available for the reinforcement of building foundations and other structural improvements necessitated by the construction of air traffic control tower cabs on the roofs of those buildings.

A more recent case found an exception in a situation not covered by any of FAA's statutory authorities. The decision, 69 Comp. Gen. 673 (1990), held that the inclusion in a lump-sum appropriation of funds for environmental cleanup at a facility being leased by the FAA on a long-term basis was sufficient to authorize the FAA to make permanent improvements to the facility deemed necessary for the cleanup. The expenditure had been specified in committee reports but not the appropriation act itself. The lesson of this case is that, since the permanent improvement prohibition is nonstatutory, it can be overcome by congressional action that would not be sufficient if it were a statutory requirement.[121]

[120] The issue in 53 Comp. Gen. 317 was whether the expenditure was subject to the 25 percent limitation of section 322 of the Economy Act of 1932. Following B-152722, August 16, 1965, GAO held that it was. As noted earlier in the text, the Economy Act provision was repealed in 1988. While the percentage limitation no longer exists, the FAA statute remains as an independent source of authority.

[121] See the discussion of Tennessee Valley Authority v. Hill in Chapter 2.

e. Private Residences

As one might suspect, there should normally be very little occasion to consider the propriety of using appropriated funds to make permanent improvements to someone's private residence. However, as if to prove that one should never say never, the expenditure has been authorized in two cases.

In 53 Comp. Gen. 351 (1973), the former Veterans Administration sought to install central air conditioning in the home of a disabled veteran. The VA received appropriations for necessary inpatient and outpatient care, and the applicable program legislation defined authorized medical care as including home health services. The legislative history indicated an intent to emphasize non-hospital treatment. The air conditioning was not just a matter of comfort. According to the VA, certain disabled veterans "suffer from a severe impairment of the heat regulatory mechanisms of their bodies to such an extent that their body temperatures can only be safely maintained in an artificially controlled physical environment." The expenditure could not be justified as an exception under the tests of 42 Comp. Gen. 480 (1963) and its progeny because the primary beneficiary would be the disabled veteran, not the government. Nevertheless, upon an administrative determination that the expense was necessary for the effective and economical treatment of the veteran, and that the only alternative would be admission to a hospital, the expenditure was authorized.

As noted in Chapter 4, decisions have held that an agency may use its operating appropriations to protect an agency official whose life has been threatened if the danger may impair the functioning of the agency. A 1991 case, 71 Comp. Gen. 4, took this one step further and held that the Drug Enforcement Administration could use its appropriations to enclose and secure a carport at the leased residence of its Administrator. Although the decision viewed the improvement as primarily benefitting the government, it is perhaps more appropriate to say that, under the circumstances presented—danger to the Administrator's life—the fact of shared benefit, or of some residual benefit to the landlord, should not be enough to invalidate an expenditure which otherwise meets the tests. Of course, the agency would also have to take appropriate measures, possibly in the form of a provisional agreement with the landlord, to protect the government's interest in the improvement. Id. at 6.

H. Disposal

1. The Property Clause

A fundamental point to understanding the body of law governing the operation of federal agencies is that no government official may dispose of government-owned property unless authorized by Congress. The source of this rule is Article IV, section 3, clause 2 of the United States Constitution, the so-called Property Clause:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

By virtue of the Property Clause, no agency or official of the government is authorized to sell, lease, give away, or otherwise dispose of government property without statutory authority, either explicit or by necessary implication. As the Supreme Court put it in one case:

> "Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted." Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941).

This principle has been consistently recognized and applied by the Attorney General and the Comptroller General. E.g., 34 Op. Att'y Gen. 320 (1924); 65 Comp. Gen. 339 (1986); 50 Comp. Gen. 63 (1970); B-157578, September 7, 1965. "Like any other owner [Congress] may provide when, how and to whom its land can be sold." United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

The Property Clause is not limited to real property but applies to personal property as well. As the Supreme Court explained in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 331 (1936):

> "The occasion for the grant [in the Property Clause] was the obvious necessity of making provision for the government of the vast territory acquired by the United

States. The power to govern and to dispose of that territory was deemed to be indispensable to the purposes of the cessions made by the States. . . . The grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to 'other property belonging to the United States,' so that the power may be applied, as Story says, 'to the due regulation of all other personal and real property rightfully belonging to the United States.' And so, he adds, 'it has been constantly understood and acted upon.'"

The Property Clause applies to all forms of property, intangible as well as tangible, and this includes legal rights. One manifestation of this is the rule that, unless authorized by statute, government officers have no right to modify existing contracts, or to waive or surrender contract rights which have vested in the government, without some compensating benefit to the government. E.g., 47 Comp. Gen. 732, 736 (1968); 40 Comp. Gen. 684, 688 (1961); B-174058, October 18, 1972. Another is the rule that no government official may, absent statutory authority, waive a debt owing to the United States. E.g., B-171934, April 2, 1971. Similarly, an agency may not, unless authorized by statute, waive the enforcement of a forfeiture accruing to the government's benefit without consideration. 53 Comp. Gen. 574 (1974); 40 Comp. Gen. 309 (1960). This includes the retention of liquidated damages. 26 Comp. Gen. 775, 777 (1947).

The interagency transfer of excess real or personal property is not a disposal for purposes of the Property Clause. 32 Op. Att'y Gen. 511 (1921).

The right to dispose of government property which is no longer needed has been termed "an essential governmental function in the economic management of governmental affairs." City of Springfield v. United States, 99 F.2d 860, 863 (1st Cir. 1938). Congress has delegated this authority to executive agencies in several statutes, the most important of which is the Federal Property and Administrative Services Act.

2. Disposal Under the Federal Property and Administrative Services Act

The Federal Property and Administrative Services Act presents a fairly complex scheme for the disposal of government property. The starting point is the definition of two key terms, "excess property" and "surplus property":

"The term 'excess property' means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof. . . ."

"The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of GSA]." 40 U.S.C. §§ 472(e) and (g).

Note that the using agency declares property to be excess, but GSA must declare it to be surplus. Property must be excess before it can be surplus.[122] Obviously, the arbitrary classification of property as excess or surplus in order to provide statutory authority for disposal which otherwise does not exist, is improper. B-61717, April 10, 1947.

a. Excess Property

Agencies have a continuing responsibility to survey property under their control in order to identify property which has become excess. 40 U.S.C. § 483(b). GSA tells agencies to do this at least annually. 41 C.F.R. § 101-47.201-2(a)(1). If an agency identifies property which appears to be excess, it should first see if some other component of the agency can use it. 40 U.S.C. § 483(c). If the property is not needed within the agency, it should be reported to GSA as excess. 41 C.F.R. §§ 101-47.201-2(a)(3), 101-47.202-1. Conversely, if the agency needs property and cannot fill its need by transfer or improved utilization of property already under its control, it should report its need to GSA. 41 C.F.R. §§ 101-47.201-2(c), (d)(2), (d)(3).

GSA then has the responsibility of determining if there is a need for the property by any other federal agency, government corporation, or the District of Columbia, and directing transfer of the property accordingly. 40 U.S.C. § 483(a)(1). According to the legislative history of the Federal Property Act, detailed in B-101646, November 2, 1976 (internal memorandum), GSA is to do this by conducting a "survey" of the needs of other agencies. GAO regards the term "survey" in this context as flexible. It does not require GSA to follow specifically detailed procedures.

"Rather, [the Administrator of GSA] may execute his survey on the basis of a broad analysis from an overall viewpoint making use of his general and specific

[122]The definitions do not distinguish between real property and personal property and the same general scheme applies to both. Some of the operating provisions apply only to one type or the other, however.

knowledge of the situation in his role as the manager of the Government's property." B-165868, June 30, 1971.

GSA calls its procedure "screening." 41 C.F.R. § 101-47.203-5. If GSA finds a "match" and determines that transfer is in the government's best interest, the property is transferred. 41 C.F.R. § 101-47.203-7(b).

The statute requires reimbursement by the receiving agency if either the transferor or the transferee is the District of Columbia or a government corporation subject to the Government Corporation Control Act, or if the property was acquired by using a revolving or reimbursable fund and the transferor agency requests reimbursement of the net proceeds. In all other cases, the extent of reimbursement, if any, is left to the determination of GSA and OMB. 40 U.S.C. § 483(a)(1). Pursuant to agreement between GSA and OMB, the Federal Property Management Regulations require reimbursement of 100 percent of estimated fair market value, except that if the property will replace other property, the amount to be reimbursed is the difference between the estimated fair market value of the property to be replaced and the estimated fair market value of the property to be transferred. 41 C.F.R. § 101-47.203-7(f)(2)(i). The transfer is made without reimbursement if it is specifically non-reimbursable by statute, or if GSA, with OMB's approval, grants an exception. 41 C.F.R. § 101-47.203-7(f)(2)(ii).

Since the receiving agency has already demonstrated a need for the property in order to qualify for the transfer, the amount of the reimbursement is a necessary expense of, and therefore chargeable to, operating appropriations for the program for which the property is to be used. 38 Comp. Gen. 782 (1959). If the property being transferred is a leasehold, the fair market value should not include any restoration obligation incurred by the transferring agency. 28 Comp. Gen. 251 (1948).

Congress occasionally waives the federal government's immunity from state and local taxation with respect to real property owned by a government corporation. E.g., 12 U.S.C. § 1825(a) (Federal Deposit Insurance Corporation). If property subject to such a waiver is declared excess under the Federal Property Act and transferred to an agency or entity that does not have such a waiver, the waiver dies with the transfer and the transferee agency is not authorized to continue paying the taxes. 32 Comp. Gen. 164 (1952); 36 Comp. Gen. 713 (1957); 34 Comp. Gen. 319 (1955). See also Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960), and Board of County Commissioners of Sedgwick County v. United States, 105 F. Supp. 995 (Ct. Cl. 1952) (addressing the issue under the Surplus Property Act of 1944, the predecessor of the Federal Property Act). The immunity attaches on the date the property is declared excess. 32 Comp. Gen. 574 (1953).

As noted above, a government corporation can receive excess property but must pay for it. In the case of a mixed-ownership government corporation, the property loses its federal identity upon being transferred. Therefore, if the property should later become excess to the mixed-ownership corporation, the corporation may dispose of it without having to follow the Federal Property Act. See B-101646/B-175155, September 6, 1979 (internal memorandum discussing transfer to Amtrak).

b. Surplus Property

If no other agency needs the property, GSA then declares it to be surplus. If some other agency has requested transfer as excess property, it cannot be declared surplus until the request has been withdrawn. Skokomish Indian Tribe v. GSA, 587 F.2d 428 (9th Cir. 1978). GSA has "supervision and direction over the disposition of surplus property." 40 U.S.C. § 484(a). GSA, or any executive agency so authorized by GSA, may dispose of surplus property "by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, [and may] take other such action as it deems necessary or proper to dispose of such property." 40 U.S.C. § 484(c). GSA's regulations specify when GSA must act as the disposal agency and when the "holding agency" may do so. 41 C.F.R. § 101-47.302. Absent some applicable statutory exception, 40 U.S.C. § 484 is the exclusive means for the government to divest itself of a property interest. United States v. 434.00 Acres of Land in the County of Camden, Georgia, 792 F.2d 1006 (11th Cir. 1986) (common-law rule that easement terminates when purpose for which it was created ceases to exist not applicable to easement held by government).

The "necessary or proper" clause in 40 U.S.C. § 484(c) "suggests broad power." United States v. 1.33 Acres, 9 F.3d 70, 73 (9th Cir. 1993). That case held that GSA was authorized to condemn an easement several years after the sale of adjacent property in order to complete the sale. (The easement was necessary for access to a highway and the parties could not come to voluntary terms.) GSA may also, under the broad authority of 40 U.S.C. § 484, authorize the interim nonfederal use of surplus property by lease or permit. See 41 C.F.R. § 101-47.312; B-101646, October 11, 1977 (internal memorandum). The statute does not, however, authorize the use of options to purchase, either standing alone or included in a lease. 41 Op. Att'y Gen. 294 (1957).

Unless otherwise provided by statute or in the deed by which the government acquired the property, the person from whom the government acquired the property does not have an automatic or inherent right to repurchase it if it is declared surplus. This is true regardless of how the property was acquired. Harrison v. Phillips, 185 F. Supp. 204 (S.D. Tex. 1960), aff'd, 289 F.2d 927 (5th Cir. 1961), cert. denied, 368 U.S. 835 (property acquired by voluntary purchase); 34 Comp. Gen. 374 (1955) (donation); B-165511, March 21, 1978 (eminent domain).

With certain exceptions, the disposal agency should have the property appraised. 41 C.F.R. § 101-47.303-4. GSA treats the appraisal results as confidential so as not to influence the government's ability to sell at a favorable price. The courts and GAO agree with this nondisclosure policy. Government Land Bank v. GSA, 671 F.2d 663 (1st Cir. 1982); Martin Marietta Aluminum, Inc. v. GSA, 444 F. Supp. 945 (C.D. Cal. 1977); B-101646, August 16, 1979. The court directed disclosure in GSA v. Benson, 415 F.2d 878 (9th Cir. 1969), but the sale had already taken place and the purchaser needed the information for tax purposes.

Subject to several exceptions, the law provides that disposals of surplus property "shall be made after publicly advertising for bids." 40 U.S.C. § 484(e)(1). While the solicitation is not required to specify a minimum acceptable bid, the government is also not required to give the property away and may reject all bids. 40 U.S.C. § 484(e)(2)(C); B-212285, November 15, 1983. As noted above, the law authorizes sale for cash or credit. If the solicitation specifies that either is equally acceptable, the agency cannot give a preference to cash terms after bids have been opened. B-189500, March 21, 1978. The implied obligation to treat all bids fairly and honestly applies to sales of property as well as to procurement contracts. Prineville Sawmill Co. v. United States, 859 F.2d 905, 909 (Fed. Cir. 1988).

As a general proposition, a wide disparity between appraised values and bid prices is not enough to put the contracting officer on constructive notice of a mistake in bid because of the "myriad of uses" to which the land might be put. B-177695, January 22, 1973. However, in a case where the appraiser had indicated that the property would have little value to anyone other than the immediate adjacent landowner, and there was a large disparity between the appraisal and a bid by someone other than the adjacent landowner, the contracting officer should have been put on notice of the possibility of mistake and should have sought confirmation of the bid. B-160113, November 25, 1966.

If an appraisal is based on a mistake, the resulting contract of sale may be reformed to permit partial refund of the purchase price. B-71334, February 3, 1948 (appraisal included irrigation rights which in fact did not exist). Although not discussed in that decision, this is not viewed as a surrender of contract rights for purposes of the Property Clause. Also, depending on the circumstances, it may be possible to rescind the contract. See Morris v. United States, 33 Fed. Cl. 733, 744-748 (1995)(discussing the theories of misrepresentation, mutual mistake, and unilateral mistake in the context of government real property sales).[123]

The solicitation may require bid deposits or "earnest money," apparently at the agency's discretion, with the winning bidder's deposit to be applied to the purchase price. Any time after acceptance of the offer but prior to the time specified for performance, i.e., while the contract is still executory, the agency may agree to rescind the contract and refund the earnest money. 26 Comp. Gen. 775 (1947). Once there has been a breach or default by the purchaser, however, the deposit belongs to the government and may not be refunded unless expressly provided by statute or in the contract. Id.; 8 Comp. Gen. 592 (1929); B-160256, January 5, 1967, aff'd on recons., B-160256, October 18, 1968. Once an offer has been accepted, earnest money deposits provided by other bidders must be returned. 41 C.F.R. § 101-47.305-3.

[123] See also Dairyland Power Cooperative v. United States, 16 F.3d 1197 (Fed. Cir. 1994); Badgley v. United States, 31 Fed. Cl. 508 (1994); Meek v. United States, 26 Cl. Ct. 1357 (1992); Hartle v. United States, 22 Cl. Ct. 843 (1991).

While advertising for bids is the preferred method of disposal, the statute prescribes a number of situations in which surplus property can be disposed of by negotiated sale, as long as the government obtains "such competition as is feasible under the circumstances." 40 U.S.C. § 484(e)(3). One is when "the character or condition of the property or unusual circumstances make it impractical" to advertise for bids and fair market value can be obtained by negotiation. 40 U.S.C. § 484(e)(3)(G). For an example of a negotiated exchange under this authority, see B-165868, November 19, 1971; B-165868, June 30, 1971; and B-165868, September 29, 1970 (all involve the same exchange). Another situation in which disposal may be negotiated is when

> "the disposal will be to States, Territories, possessions, political subdivisions thereof, or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation." 40 U.S.C. § 484(e)(3)(H).

The determination of what constitutes "feasible competition" is within GSA's discretion. Dover Sand & Gravel, Inc. v. Jones, 227 F. Supp. 88 (D.N.H. 1963). When negotiating a disposal under subsection (H), GSA is not required to consider offers from nonpublic sources. 57 Comp. Gen. 823 (1978). While subsection (H) does not authorize disposal for less than fair market value, nothing prevents the government from getting more if it can. Port of Seattle v. United States, 450 F.2d 1363 (Ct. Cl. 1971); B-217356, April 22, 1985 (internal memorandum). Since the use of subsection (H) is itself discretionary, there is also nothing to prevent the government from rejecting an offer of fair market value. Government Land Bank v. GSA, 671 F.2d 663, 667 (1st Cir. 1982).

If the government chooses to dispose of surplus property by negotiated sale, the responsible agency must, with exceptions specified in the statute, prepare "an explanatory statement . . . of the circumstances of each disposal," and transmit the statement "to the appropriate committees of the Congress in advance of such disposal." 40 U.S.C. § 484(e)(6). This is nothing more than a "report and wait" provision and is not subject to attack on constitutional grounds. City of Alexandria v. United States, 737 F.2d 1022 (Fed. Cir. 1984). If an agency other than GSA prepares the statement, the agency should submit it to GSA who will in turn submit it to the committees. 41 C.F.R. § 101-47.304-12(d). Nothing in the statute purports to make the validity of a disposal in any way contingent upon compliance with the reporting requirement. See B-116344, July 21, 1955.

In general, it is improper to classify property as excess or surplus if the holding agency still needs it. This follows from the very definitions quoted earlier. GAO has looked at several cases where an agency wanted to sell property and then lease it back, or sell some facility and then contract with the new owner to provide the same service the facility was providing when it was in government hands. These cases are always questionable, and the agency has the burden of showing that there is some rational basis for its determination. However, an axiom of life is "never say never," and the legitimacy of the transaction cannot be categorically foreclosed. For example:

"There may be instances where certain property, such as communication facilities, could be sold and the purpose for which it was being used accomplished through private contracts at a cost less than the Government's costs of operation and maintenance of the property. In such cases, it could be argued that the Government's need was for the availability of communication services rather than for a property right in the facilities." B-132099, July 22, 1957.

While the discussion in B-132099 was hypothetical, an actual situation occurred in B-146494, December 4, 1961, concerning the sale of an ammonium perchlorate facility. GAO was satisfied that "the only need of the Government is that sufficient productive capacity be in existence, without reference to whether such productive capacity is Government-owned or privately-owned."

Situations like those described in B-132099 and B-146494 are the clear exception, and in most cases the proper basis for disposal as surplus property will not exist. B-132099, June 25, 1958. Thus, whatever justifications might work in the case of industrial facilities do not work when the need is for office space at a particular location. B-152223, November 6, 1963. Similarly, there is no authority for a "sale with lease-back" simply because the agency does not have enough money for needed renovations. 65 Comp. Gen. 339 (1986). See 45 Comp. Gen. 265 (1965), however, for a case approving the sale of excess property to the successful bidder on a contract to construct a building on that property to be leased to a different agency.[124]

Subsection (k) of 40 U.S.C. § 484 provides for a number of discretionary types of disposal. GSA can assign surplus property to the Departments of Education or Health and Human Services for conveyance to state and local bodies to be used for education or public health purposes. 40 U.S.C. § 484(k)(1); 41 C.F.R. § 101-47.308-4. These are called "public benefit discount conveyances." See Northrop University v. Harper, 580 F. Supp. 959, 961 (C.D. Cal. 1983). In cases where GSA had already contracted to sell the property to the state or local educational body but title had not yet passed and the purchase price had not yet been paid, GAO has approved rescission of the contract to permit transfer under the (k)(1) procedures. 40 Comp. Gen. 455 (1961); B-157885, November 8, 1965. However, this is not available where the sale has been consummated and the purchase price paid. B-162194, August 18, 1967.

In B-109403, June 3, 1952, the government wanted to reserve mineral rights because a survey suggested the presence of oil. However, a provision purporting to obligate the United States to pay any damages resulting from exercise of the mineral rights amounted to an open-ended indemnification agreement and was therefore unauthorized.

Another subsection authorizes GSA to assign surplus property to the Interior Department for reconveyance for public park or recreation purposes. 40 U.S.C. § 484(k)(2); 41 C.F.R. § 101-47.308-7. GSA's administration of this authority is highly discretionary. New England Power Co. v. Goulding, 486 F. Supp. 18 (D.D.C. 1979) (entirely proper for GSA to give priority to disposal under this subsection). See also Northrop University, 580 F. Supp 959.

Still another subsection authorizes GSA to convey to states or municipalities, without monetary consideration, surplus real property which is suitable and desirable for use as a historic

[124]The legal dilemma in that case was that there is no authority to sell excess property to a private party, and no authority to declare the property surplus if another agency needs it.

monument. 40 U.S.C. § 484(k)(3); 41 C.F.R. § 101-47.308-3. GSA may authorize use of the property for revenue-producing activities. 40 U.S.C. § 484(k)(3)(A); 60 Comp. Gen. 158 (1981). As with the other subsections, subsection (k)(3) is limited to surplus property and does not authorize conveyance of nonsurplus property. B-126823, July 21, 1965.

c. Disposition of Proceeds

The disposition of the proceeds from the disposal of excess and surplus property is governed by 40 U.S.C. § 485, as effectively modified by 16 U.S.C. § 460l-5(a). Subsection (a) of 40 U.S.C. § 485 provides that all proceeds from any transfer of excess property or sale or other disposition of surplus property, except as otherwise provided in the remaining subsections of section 485, must be deposited in the Treasury as miscellaneous receipts. One of the exceptions, already noted, is property acquired by use of a revolving or reimbursable fund. 40 U.S.C. § 485(c). Another, subsection 485(d), permits agencies to deposit part of the proceeds in a special account in the Treasury so that they will be available for refunds if necessary. Subsection 485(e) recognizes contract provisions which permit the proceeds of any sale of government property in the contractor's custody to be credited to the cost or price of work under the contract.

In 1964, Congress enacted Public Law 88-578, the Land and Water Conservation Fund Act of 1965. Section 2(b) of that law, 78 Stat. 897, 899, as codified at 16 U.S.C. § 460l-5(a), requires deposit in the Land and Water Conservation Fund of:

> "All proceeds . . . hereafter received from any disposal of surplus real property and related personal property under the Federal Property and Administrative Services Act of 1949, as amended . . . notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury. Nothing in this part shall affect existing laws or regulations concerning disposal of real or personal surplus property to schools, hospitals, and States and their political subdivisions."

The portion of the above provision not quoted gives two categories of exceptions. First, the requirement does not apply to the various subsections of 40 U.S.C. § 485 which themselves provide exceptions to the miscellaneous receipts requirement of 40 U.S.C. § 485(a). Second, it does not apply to provisions in appropriation acts like the following provision which appeared in the Independent Offices Appropriations Act of 1963, Pub. L. No. 87-741, 76 Stat. 716, 725, under the heading "Operating Expenses, Utilization and Disposal Service [GSA]":

"For necessary expenses, not otherwise provided for, incident to the utilization and disposal of excess and surplus property, as authorized by law, $8,500,000, to be derived from proceeds from the transfer of excess property and the disposal of surplus property."

The Land and Water Conservation Fund is a fund in the Treasury used to finance acquisitions mostly by the Departments of Interior and Agriculture (national parks, national forests, national wildlife refuges). 16 U.S.C. § 460l-9. Money in the fund is available for expenditure "only when appropriated therefor." 16 U.S.C. § 460l-6.

Thus, the 1964 legislation preserved the exceptions of the Federal Property Act, and recognized what would be true in any event—that Congress can legislate exceptions in the future. Subject to these exceptions, proceeds from the sale of surplus real property go to the Land and Water Conservation Fund and not the general fund. The Federal Property Management Regulations reflect this change. 41 C.F.R. § 101-47.307-6. Nothing in the 1964 legislation purported to affect the treatment of proceeds from the transfer of excess property.

Since the disposition of sale proceeds is governed by statute, a 1946 decision found no authority for a proposal to transfer title to a warehouse (built by the government on leased land) to the landowner with its value to be amortized against rental payments. The proposal would have the effect of using the sale proceeds as rent. B-61717, December 10, 1946.

A 1966 decision, 46 Comp. Gen. 356, considered the operation of 16 U.S.C. § 460l-5(a) in the context of a government corporation which was in the process of going out of business. The Virgin Islands Corporation had terminated its operations and wanted to close its books, but there were some assets remaining to be sold. If the books remained open, it was clear that the proceeds would be credited to the corporation's revolving fund, in accordance with 40 U.S.C. § 485(c), and used to offset the government's equity. It was suggested, however, that since the revolving fund was no longer needed, the corporation's accounts could be closed and the proceeds deposited in the Land and Water Conservation Fund. The decision concluded that closing the accounts as a matter of administrative convenience should not have the effect of diverting the proceeds from being used to repay the government's investment. Since any balances on hand at the time of closing would be deposited as miscellaneous receipts, that was also the proper disposition of the sale proceeds.

d. Deduction of Expenses

A statute, 40 U.S.C. § 485a, provides:

> "[F]rom the proceeds of sales of . . . public property of any kind, before being deposited into the Treasury, either as miscellaneous receipts . . . or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales so as to require only the net proceeds of such sales to be deposited into the Treasury . . . ."

This statute originated in 1896. Decisions of the Comptroller General and Comptroller of the Treasury over the decades established the rule that this provision allowed the deduction only of expenses directly connected with the sale and did not authorize deduction of expenses incurred in connection with preparation of the property for sale. E.g., 42 Comp. Gen. 212, 213 (1962). Thus, such things as appraisers' fees, brokerage commissions, auctioneers' fees, and advertising costs could be deducted from the proceeds prior to deposit in the Treasury. 37 Comp. Gen. 59 (1957); 33 Comp. Gen. 31 (1953); 16 Comp. Gen. 876 (1937).

The problem is that 40 U.S.C. § 485a is in apparent conflict with subsequently enacted statutes. It was amended in 1951 (65 Stat. 707) to insert the introductory clause, "Subject to applicable regulations under the Federal Property and Administrative Services Act of 1949, as amended." In more direct conflict is 40 U.S.C. § 485(a), requiring deposit in the Treasury of "all proceeds" except as provided in the remaining subsections of that section. In addition, 16 U.S.C. § 460l-5(a) requires that "all proceeds" be deposited in the Land and Water Conservation Fund except for the situations noted above. Thus, 40 U.S.C. § 485a refers to "net proceeds" while 40 U.S.C. § 485(a) and 16 U.S.C. § 460l-5(a) specify "all proceeds."

A 1947 decision, 26 Comp. Gen. 857, considered the relationship of 40 U.S.C. § 485a to a provision in the Surplus Property Act of 1944, the predecessor of the Federal Property and Administrative Services Act, which also required deposit in the Treasury of "all proceeds" from property disposals. The decision found the two provisions to be in "obvious conflict," and held that the Surplus Property Act controlled as the latest expression of Congress. 26 Comp. Gen. at 859.

Although there appears to be no decision considering the same question in relation to the current statutes, it has been suggested that 40 U.S.C. § 485a is inconsistent with the current statutes and has been "superceded." See B-232827, October 19, 1988 (internal memorandum considering the conflict in relation to personal property).

The conflict with 40 U.S.C. § 485(a) covers disposals under the Federal Property and Administrative Services Act; the conflict with 16 U.S.C. § 460l-5(a) covers surplus real property and related personal property. For disposals not within these areas of conflict, 40 U.S.C. § 485a continues to apply. 28 Comp. Gen. 594 (1949); B-81635, December 9, 1948.

e. Disposal Under Other Authorities

That the Federal Property and Administrative Services Act was intended to be the pre-eminent law in the areas it covers is evidenced by the first sentence of 40 U.S.C. § 474:

> "The authority conferred by this Act shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith . . . ."

Be that as it may, the Federal Property Act is not the only disposal authority. Exceptions to the Federal Property Act's authority tend to be of two types: (1) general provisions applicable to an agency or program, and (2) statutes addressing a specific piece of property.

As to the first type, a 1992 GAO study identified 17 agencies with authority to dispose of real property. Real Property Dispositions: Flexibility Afforded Agencies to Meet Disposition Objectives Varies, GAO/GGD-92-144FS (September 1992). As the title implies, GAO found considerable variation in the programs and their objectives.

In some cases, the statutes deal with property that is exempt from the Federal Property Act by its terms, such as public domain lands. An example is 43 U.S.C. § 1713, authorizing the Interior Department to sell tracts of public land meeting specified disposal criteria. In a case involving the predecessor of this statute, the Bureau of Land Management vacated a sale when, after several years of appeals, re-appeals, and cross-appeals by the bidders, it learned that the appraised value of the property had increased much beyond the amount of the bids. Noting that the courts had upheld the discretion of the Secretary of the Interior to refuse to sell for whatever reason he found adequate, GAO concluded that the Bureau did nothing wrong. B-168879, May 7, 1970.

For property which would otherwise be within the scope of the Federal Property Act, language such as "notwithstanding any other provision of law" will provide the necessary exemption. B-178205.80, March 16, 1976. Other statutes use more specific exempting language, such as "without regard to the laws governing the disposition of excess or surplus property of the United States." An example is 7 U.S.C. § 1985(c), applicable to certain Department of Agriculture activities. Sale under this provision is to be "at the best price obtainable for cash or on secured credit." Id. Under this language, one court has held that giving a preference to cash bids without providing advance notice of that policy either by regulation or in the solicitation constituted arbitrary and capricious conduct. Simmons v. Block, 782 F.2d 1545 (11th Cir. 1986). The remedy was to re-advertise with full disclosure of the preference. Id. at 1550. A similiar provision from the housing laws is 12 U.S.C § 1750c(f), applied in Montreal Securities, Inc. v. United States, 329 F.2d 956 (Ct. Cl. 1964).

The Internal Revenue Service is authorized to sell property seized under a tax levy. 26 U.S.C. § 6335. If there are no bids from the public at or higher than the minimum price set by the IRS, the United States may purchase the property at that minimum price. 26 U.S.C. § 6335(e)(1)(C). The former owner has the right to redeem the property within 180 days after the sale by paying the purchase price plus interest. 26 U.S.C. § 6337. A sale under 26 U.S.C. § 6335 is a sale only of the taxpayer's interest in the property—any equity over and above outstanding mortgages and liens. Belgard v. United States, 232 F. Supp. 265, 269 (W.D. La. 1964) (seizure and sale under section 6335 had no effect on taxpayer's indebtedness to Small Business Administration).

The second type of exception consists of statutes authorizing or directing the disposal of a particular piece of property in accordance with specified standards or procedures. GSA calls these "special statutes," and recognizes that they are not governed by the Federal

Property Act. 41 C.F.R. § 101-47.301-3. GAO considered one example in B-194482, June 15, 1979. The U.S. Fire Administration, Department of Commerce, had been authorized to purchase, and did purchase, a site for a National Academy for Fire Prevention and Control. When problems developed over the use of that site, Congress enacted legislation authorizing the Fire Administration to sell it, deposit the proceeds in a special account, and apply those funds to the acquisition of a new site. Applying two principles of statutory construction—(1) the specific governs over the general, and (2) if there is any inconsistency, the later enactment controls—and noting GSA's treatment of "special statutes," GAO concluded that the Fire Administration could dispose of the site without regard to the requirements of the Federal Property and Administrative Services Act.

3. Use by Nongovernment Parties

a. Leasing and Concessions

(1) Outleasing in general

The government acquires property in order to perform its own functions, not for use by nongovernment parties. Nevertheless, there are situations in which it is clearly desirable to permit use by nongovernment parties, either in support of the primary government purpose or as an alternative to letting the property sit idle.

Leasing is a form of disposal for purposes of the Property Clause, and is therefore a function of Congress. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 331 ("The power of disposal was early construed to embrace leases"); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840); 34 Op. Att'y Gen. 320, 322 (1924); 50 Comp. Gen. 63 (1970); 14 Comp. Gen. 169 (1934); B-191943, October 16, 1978. Accordingly, a federal agency needs statutory authority in order to "outlease" (lease government-owned property to nongovernment parties) property under its control. Naturally, when and if Congress grants such authority, it may also impose conditions on it. E.g., Light v. United States, 220 U.S. 523, 536 (1911) (United States "can prohibit absolutely or fix the terms on which its property may be used").

One question is how specific the authority needs to be. A 1978 GAO study found instances where agencies treated the authority to lease as incident to more general statutory authority giving them custody and control over certain space. See Government Space Leased to Commercial Activities by Agencies Other Than the General Services Administration, LCD-78-337 (October 13, 1978). GAO drew no legal conclusions in the cited report because the issue had been raised in a pending lawsuit. That lawsuit produced Globe, Inc. v. Federal Home Loan Bank Board, 471 F. Supp. 1103 (D.D.C. 1979), in which the court held that GSA possessed long-term commercial outleasing authority, but not the former Federal Home Loan Bank Board. While Globe certainly supports the proposition that specific authority is required, it was based in part on provisions of the Board's enabling legislation and the extent to which it applies to all agencies has not been addressed.

In any event, those agencies most likely to have the need to engage in outleasing have the necessary statutory authority. GSA's authority is found in several provisions of the Federal Property and Administrative Services Act. Under 40 U.S.C. § 490(a)(13), GSA may lease federal buildings sites, including improvements, at a "fair rental value," until they are needed for construction purposes. While this at first blush may seem like fairly short-term authority, a site may not be needed for construction for decades. E.g., B-168096, August 5, 1974 (site had been leased to commercial parking operators since 1930s). GSA is also authorized to lease space to "persons, firms, or organizations engaged in commercial, cultural, educational, or recreational activities," as defined in 40 U.S.C. § 612a, at rates equivalent to the prevailing commercial rate for comparable space. 40 U.S.C. §§ 490(a)(16) and (a)(17). A provision which is not part of the Federal Property Act, 40 U.S.C. § 304a, authorizes GSA to lease certain excess property outside the District of Columbia for periods of up to 5 years.

The military departments are authorized to outlease nonexcess property under their control that is not needed for public use at the time, for terms of up to 5 years. 10 U.S.C. § 2667. The purpose of this provision is

> "to enable property not immediately needed to be leased in such a manner that it will be utilized with as few changes as possible in order that the property could immediately be put back into operation in the event of an emergency." City of San

Francisco v. United States, 443 F. Supp. 1116, 1122 (N.D. Cal. 1977), aff'd, 615 F.2d 498 (1980).

The military departments have had some form of outleasing authority since 1892. See 8 Comp. Gen. 632 (1929). Under this authority, military departments have leased real property for grazing purposes (56 Comp. Gen. 655 (1977)) and agricultural purposes (B-174833, March 10, 1972). They have leased water treatment and transmission facilities to local water districts who could, after supplying the needs of the military reservation, sell the remaining capacity. B-162141, October 18, 1967. They have used the authority of 10 U.S.C. § 2667 to permit former owners of property acquired by the government to remain as lessees until the property is needed for project requirements. 52 Comp. Gen. 300 (1972).[125] And they have used it to grant rent-free use, except for maintenance and service charges, to other government agencies. B-119724-O.M., April 25, 1955.

Leasing authority under 10 U.S.C. § 2667 continues to exist until there has been a final determination that the property is excess. B-188246, May 17, 1978 (preliminary or conditional determination does not terminate the authority). However, it does not apply to property which usage inescapably shows to be excess notwithstanding the absence of a formal determination. B-118030, July 23, 1954.

The Small Business Administration is authorized to rent (or sell) any real property acquired in connection with its loan programs. 15 U.S.C. § 634(b)(3); United States v. Schwartz, 278 F. Supp. 328, 330 (S.D.N.Y. 1968). Other agencies with specific outleasing authority include the Coast Guard (14 U.S.C. § 93(n)), the National Aeronautics and Space Administration (42 U.S.C. § 2473(c)(3)) the National Science Foundation (42 U.S.C. § 1870(e)), the Bureau of Land Management (43 U.S.C. § 1732(b)), the Postal Service (39 U.S.C. § 401(5)), the Internal Revenue Service (26 U.S.C. § 7506(c)), and the General Accounting Office (31 U.S.C. § 782).

[125]When the government does this, the rent it may charge "shall not exceed the fair rental value of the property to a short-term occupier." 42 U.S.C. § 4651(6).

We saw earlier in this chapter that the rights and obligations of the parties are determined mostly under federal law when the government is the lessee. The court in United States v. Morgan, 196 F. Supp. 345 (D. Md. 1961), aff'd, 298 F.2d 255 (1962), applied the same principle where the government was the lessor. In another case, however, the United States successfully brought an unlawful detainer action under a state law which provided for the recovery of double rent. United States v. Hall, 463 F. Supp. 787 (W.D. Mo. 1978), aff'd, 588 F.2d 1214 (8th Cir. 1978).

The disposition of income received from outleasing varies considerably. The only safe generalization is the one that applies to all government receipts under 31 U.S.C. § 3302(b): the money must be deposited in the Treasury as miscellaneous receipts unless the agency has statutory authority for some other disposition. In the area of property leases, this rule is reinforced by 40 U.S.C. § 303b, although the clear trend is away from miscellaneous receipts. Rent received by GSA under the subsections of 40 U.S.C. § 490 cited above is deposited in the Federal Buildings Fund. 40 U.S.C. §§ 490(a)(13) and (a)(18). Rent received by military departments under 10 U.S.C. § 2667 is deposited in a special account in the Treasury to be available, as specified in appropriation acts, for purposes specified in the statute. 10 U.S.C. § 2667(d). A special account is also authorized for income received by the General Accounting Office from renting space in the GAO headquarters building, the receipts to be available as specified in appropriation acts, for maintenance, operation, and repair of the building. 31 U.S.C. § 782.

Many other situations are governed by specific statutory provisions. For example, rent received by the Corps of Engineers "for rental of plant owned by the Government in connection with the prosecution of river and harbor works" may be credited to "the appropriation to which the plant belongs." 33 U.S.C. § 559. This includes the revolving fund established by 33 U.S.C. § 576. B-129718-O.M., January 3, 1957. Several types of lease income are subject to distribution formulas which allocate the receipts, with varying degrees of complexity, among a combination of state and federal purposes. Examples are:

- The Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 191 and 355.

- Income received by the Forest Service from activities in the national forests. 16 U.S.C. §§ 499 and 500.
- Grazing statutes such as the Taylor Grazing Act, 43 U.S.C. § 315i, and 43 U.S.C. § 1181d relating to certain lands in California and Oregon. See B-203771, January 13, 1982.

(2) 40 U.S.C. § 303b

A question that once generated considerable controversy is whether the "rent" for a lease of government property could include things other than money, such as making repairs or alterations to the property. Opinions split among predictable lines. GAO took the position that rent should be in the form of money only, on the grounds that anything else would amount to a circumvention of the miscellaneous receipts requirement. 8 Comp. Gen. 632 (1929); A-38658, July 15, 1932. The executive branch countered that the authority to lease necessarily implied the authority to agree to forms of consideration other than money. 36 Op. Att'y Gen. 282 (1930). Congress entered the fray by enacting section 321 of the Economy Act of 1932, 47 Stat. 382, 412, 40 U.S.C. § 303b:

> "[E]xcept as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same. The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts."

The Senate Appropriations Committee explained the provision as follows:

> "The enactment of this section will put a stop to the more or less general practice which has been adopted of including as a part of the rental consideration provisions in the lease that the tenant shall make certain repairs, alterations, or improvements to public property. By this method improvements are made on public property which may or may not be authorized by law, and indirectly there is an expenditure of funds which should be covered into the Treasury as miscellaneous receipts."
> S. Rep. No. 72-556, at 14-15 (1932), quoted in 41 Comp. Gen. 493, 495 (1962).

This did not mean that Congress would be unwilling to consider exceptions, merely that it wanted to reserve to itself the power to decide what those exceptions should be.

GAO has held that the statute should apply to any arrangement that creates essentially the same legal relationship as a lease regardless of what it is called. 42 Comp. Gen. 650 (1963); 41 Comp. Gen. 493 (1962). Thus, 42 Comp. Gen. 650 found the statute applicable to a proposal to permit a nonprofit organization to install a coin-operated audio-tour system in the National Zoo, the proceeds to be used to finance a teach-training program and the preparation of a guidebook on the zoo.

In 49 Comp. Gen. 476 (1970), an agency had employees working in two nearby buildings, one government-owned and one leased. A private parking operator was charging commercial rates to park in the leased building. The agency wanted to equalize parking costs for its employees, and proposed to have the private concern operate parking facilities in both buildings "as a single facility" at a uniform rate. The decision concluded that "the contemplated agreement . . . while couched in terms of management services, [amounted to] conferring an interest in Federal property, a leasehold interest from which revenues are derived, in contravention of 40 U.S.C. 303b." Id. at 478.

In B-162986, May 1, 1968, GAO considered a Forest Service proposal for a graduated rate fee system, based on a percentage of sales, to be used for national forest special use permits for commercial enterprises (e.g., ski area operators). Recognizing the relationship of returns to investment, the decision nevertheless concluded that "it would be an unwarranted extension of section 321 to view it as inhibiting any consideration of the permittee's investment for the purpose of determining the fair amount of fees to be charged." GAO applied the same approach more than 20 years later in 70 Comp. Gen. 597 (1991), finding that user fees charged by the Interstate Commerce Commission to carriers for computer equipment installed by the carriers at ICC headquarters were unobjectionable under 40 U.S.C. § 303b.

As noted, Congress has been willing to grant exceptions from 40 U.S.C. § 303b when considered desirable. For example, under 10 U.S.C. § 2667(b)(5), outleases by military departments.

> "may provide, notwithstanding [40 U.S.C. § 303b], or any other provision of law, for the improvement, maintenance, protection, repair, or restoration, by the lessee, of the property leased, or of the entire unit or installation where a substantial part of it is leased, as the payment of part or all of the consideration for the lease."

There is no formula for determining how much is a "substantial part." The "substantial part" clause was included "for the express purpose of precluding leases of a minor portion of a plant or building from being used as a subterfuge to obtain maintenance of an entire installation or building without charge to appropriations." B-141157, August 14, 1967. Within this framework, the exception permits "extraordinary as well as ordinary items of maintenance." B-145738-O.M., January 18, 1962. It is a good idea for the government to reserve the right to approve repairs and restoration since the leased property still belongs to the government. B-163784, May 2, 1968.

The statute talks about repair or restoration "of the property leased." Therefore, it does not authorize a lease of one parcel with the lessee agreeing to construct a facility for the government's use on a separate and unleased parcel. B-205685, December 22, 1981. Since the proposal was not within the exception of 10 U.S.C. § 2667(b)(5), it was prohibited by 40 U.S.C. § 303b. Also prohibited by section 303b was a proposal to lease a civilian housing area on Guam to a private concern for an annual rental of one dollar plus operation and maintenance of the housing. 27 Comp. Gen. 543 (1948). Although not specified in the decision, it is hard to see how it could be argued that the property to be leased was "not . . . needed for public use," one of the statutory conditions for leasing under 10 U.S.C. § 2667.

As the language of 40 U.S.C. § 303b requires, exceptions must be specific. The authority to enter into leases "on such terms and conditions as the [agency head] deems appropriate" is not enough. B-117919, February 5, 1954; B-140397-O.M., August 20, 1959. The structure of 10 U.S.C. § 2667, for example, bears this out. Subsection (a) authorizes the Secretary of a military department to lease property "upon such terms as he considers will promote the national defense or be in the public interest"; subsection (b)(5) then provides the specific exemption from 40 U.S.C. § 303b. General authority was enough in B-159719, March 30, 1972, because it was clear that Congress was aware of, and had sanctioned, the activity. That case involved concession agreements with the Federal Aviation Administration for various support facilities at Washington National Airport.

Some other specific exceptions are 16 U.S.C. § 20f and 40 U.S.C. § 303c (National Park Service), 38 U.S.C. §§ 8122(a)(1) and 8201(e) (Department of Veterans Affairs), 42 U.S.C. § 1544 (Department of Housing and Urban Development with respect to housing acquired or constructed under the National Housing Act), and 42 U.S.C. § 2473(c)(11) (National Aeronautics and Space Administration).

(3) Concessions

The government uses concession agreements in a wide variety of situations to support, directly and indirectly, its use of government facilities. Some, such as cafeterias or dry cleaning facilities, are found in public buildings. The major portion in terms of numbers occur on recreational lands managed by the Park Service, Forest Service, Fish and Wildlife Service, and Bureau of Land Management. GAO studies in the early 1990s found that there were approximately 9,000 concession agreements. See Federal Lands: Improvements Needed in Managing Short-Term Concessioners, GAO/RCED-93-177 (September 1993); Federal Lands: Improvements Needed in Managing Concessioners, GAO/RCED-91-163 (June 1991). The same studies noted that there is no single statute authorizing or regulating concessions, and therefore no uniformity as to their use.

GAO has long espoused the view that—

> "the operation of a concession utilizing Government-owned facilities constitutes a valuable privilege for which the Government should be compensated and that contractual and other arrangements relating to the establishment and operation of such activities should be subject to existing statutory provisions governing public contracts." 41 Comp. Gen. 493, 495 (1962).

See also B-129352, January 23, 1957. The most common manifestation of this principle has been the finding that income an agency receives from a concession should be deposited in the Treasury as miscellaneous receipts unless the agency has statutory authority to do something else. E.g., 7 Comp. Gen. 806 (1928); A-51624, March 25, 1944; A-95642, November 18, 1943; A-95642, March 19, 1943.

A related issue is the extent to which 40 U.S.C. § 303b applies to concession agreements. The following passage from 41 Comp. Gen. 493, 495 (1962) illustrates GAO's general approach:

"For all practical purposes if a concession gives a concessioner the exclusive right to the use of real property his rights are identical with [those] of a lessee and the relation of landlord and tenant is created. If the right is not exclusive the occupant is a mere licensee. The relationship of persons under such circumstances is primarily a question of fact . . . . If exclusive possession or control of the premises or a portion thereof is granted, even though the use is restricted by reservations, the instrument or agreement will be considered to be a lease and not a license."

That case involved National Park Service concessions. The Park Service uses concessioners to:

"provide innumerable goods and services including food, lodging, gasoline and souvenirs. Concession activity in the national parks is a thriving business which is becoming increasingly dominated by large corporate concessioners." National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 675-676 (D.C. Cir. 1976) (footnotes omitted).

Originally, both GAO and the Justice Department had concluded that the Park Service was not authorized to permit concessioners to withhold part of their annual fees for deposit to a special fund to finance construction work. 41 Op. Att'y Gen. 127 (1953); B-157/B-32837, August 20, 1952. The 1962 decision quoted above, 41 Comp. Gen. 493, also found 40 U.S.C. § 303b applicable to certain Park Service concession contracts. A few years later, in 1965, Congress enacted the National Park System Concessions Policy Act, 16 U.S.C. §§ 20-20g. Section 7 of that Act, 16 U.S.C. § 20f, provides a specific exemption from 40 U.S.C. § 303b for the National Park Service.

The Park Service legislation gives a concessioner who acquires or constructs improvements a "possessory interest" in those improvements, consisting of "all incidents of ownership except legal title" which, of course, remains in the United States. 16 U.S.C. § 20e. This provision recognizes the government's reliance on concessioners within the national parks, and was designed to give them a property interest which they could encumber in order to obtain construction financing. It also permits encumbrance to enable a new concessioner to finance the purchase of an existing concession. 57 Comp. Gen. 607 (1978).

In 64 Comp. Gen. 217 (1985), GAO reviewed the concession contract between GSA and Guest Services, Inc. (GSI), which operates cafeterias in government buildings in Washington. While GSA charges rent to the tenant agency for the space the cafeteria occupies, it does not charge rent to GSI. The contract requires GSI to establish a reserve in its accounting system for the purchase and replacement of equipment. Thirty years earlier, in 35 Comp. Gen. 113 (1955), GAO had found a somewhat similar arrangement to be in violation of 40 U.S.C. § 303b. That contract, however, had required the concessioner to actually transfer funds into a bank account, whereas the new reserve was "a mere bookkeeping entry in the internal accounts of GSI." 64 Comp. Gen. at 219. Also, the agreement was more of a license than a lease. Id. at 220-221. Accordingly, and in view of the "historically unique nature" of the GSA-GSI agreement, GAO concluded that there was no violation of 40 U.S.C. § 303b.

b. Granting of Revocable License

A question that arose with great frequency during the early decades of the 20th century was the extent to which the government could grant a license, as opposed to a lease, to use government-owned property. Through a large number of cases before both the Attorney General and the Comptroller General, the following rule developed:

> "[T]he head of a Government department or agency has authority to grant to a private individual or business a revocable license to use Government property, subject to termination at any time at the will of the Government, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the Government itself." B-164769, July 16, 1968.

The rationale is that a revocable license is not a property interest, and the granting of such a license is not a "disposal" for purposes of the Property Clause. Therefore, specific statutory authority is not required. The most comprehensive discussion occurs in what is probably the leading case on the subject, 34 Op. Att'y Gen. 320 (1924). Said the Attorney General:

> "It is plain that the intent of the Constitutional provision was to prevent alienation of the title, ownership, or control of Government property, whether real or personal, without Congressional sanction. That is the evil which was intended to be avoided, and no construction beyond that intent should be imposed on the prohibition unless clearly implied, especially when it would lead to unreasonable and unforeseen results." Id. at 323.

A GAO decision discussing many of the early Attorney General opinions is 22 Comp. Gen. 563 (1942). If a revocable license or permit is not a property interest for purposes of the Property Clause, it is equally not a property interest for purposes of the Fifth Amendment. Therefore, termination does not trigger a constitutional right to compensation. E.g., Acton v. United States, 401 F.2d 896 (9th Cir. 1968), cert. denied, 395 U.S. 945 (1969); Osborne v. United States, 145 F.2d 892 (9th Cir. 1944).

Based on application of the rule, the following activities were found authorized:

- Cultivation of crops on land on which Federal Communications Commission radio monitoring stations were located. 22 Comp. Gen. 563 (1942). Permitting the cultivation would not only produce money for the Treasury but would also help reduce fire hazards by controlling the growth of grass and weeds.
- Use of government research space and facilities by university faculty and graduate students. 36 Comp. Gen. 561 (1957).
- Seminar at the United States Merchant Marine Academy. B-168627, May 26, 1970.
- Rock concert on the grounds of the National Institutes of Health. B-168527, November 19, 1970.[126]
- Use of government-owned land by railroads. 30 Op. Att'y Gen. 470 (1915); 22 Op. Att'y Gen. 240 (1898). The Attorney General cautioned the agency in the 1915 opinion to make sure what it was granting was really revocable "practically speaking, whatever it might be in form." 30 Op. Att'y Gen. at 483.

A more recent case is B-191943, October 16, 1978. The question was the extent to which the Bureau of Land Management could make BLM space available to a commercial firm to microfilm public documents. The firm planned to use the documents to provide a filing service for mining claim holders, and also intended to sell copies of the microfilmed documents to the public. If the first purpose were the only use to be made of the property, the proposal would have been permissible under the revocable license rule. The second purpose was more problematic, however, because BLM had a duty under the law to provide copies of the documents to the public for a reasonable fee and should either perform the task itself or contract out for it under the procurement laws. Because it was not realistic to distinguish between the governmental and the

[126]The decision doesn't specify what was the "purpose useful or beneficial to the government," but we're sure there was one.

private or commercial purposes, GAO concluded BLM should not grant the license.

The rule applies to personal property as well as real property. 47 Comp. Gen. 387 (1968); 44 Comp. Gen. 824 (1965). GAO found a proposal unacceptable in 25 Comp. Gen. 909 (1946) because the arrangement would have the effect of permanently vesting beneficial ownership of the government property in a private contractor and would have resulted in a diminution of government control beyond that contemplated in the typical revocable license. The proposal was subsequently amended and, as amended, approved in B-57383, February 25, 1947. While 25 Comp. Gen. 909 involved personal property, the principle would, of course, be fully applicable to real property. In a similar vein is 38 Comp. Gen. 36 (1958), disapproving a proposal to permit a private utility company to install connections in a government-owned natural gas line because, under the proposed arrangement, the company would relinquish its rights only if it failed to acquire a right to purchase natural gas from the government.

A statute in this area is 40 U.S.C. § 490(a)(17), added by the Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, § 104(a), 90 Stat. 2505, 2506. It authorizes the General Services Administration—

> "to make available, on occasion, or to lease at such rates and on such other terms and conditions as the Administrator deems to be in the public interest, auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings to persons, firms, or organizations engaged in cultural, educational, or recreational activities . . . that will not disrupt the operation of the building."

The terms "cultural," "educational," and "recreational" are defined in 40 U.S.C. § 612a. GSA's implementing regulations are found at 41 C.F.R. Subpt. 101-20.4. Permits may not be issued for more than 30 calendar days, but they are renewable upon submission of a new application. 41 C.F.R. § 101-20.402(a). Permits are generally "free of charge," and this includes the normal level of services that would be provided to the building during the times of permit use. Services over and above this level must be reimbursed, but GSA may waive reimbursement if the cost is "insignificant." 41 C.F.R. § 101-20.407(a).

4. Adverse Possession

The term “adverse possession” refers to a process whereby one can obtain title to someone else’s property by “open and notorious” possession for a period of time prescribed by state law. See Black’s Law Dictionary 54 (7th ed. 1999). The time period is commonly 20 years, although there is variation.

With respect to property owned by the United States, the situation is different. The quiet title statute, 28 U.S.C. §2409a, provides that “[n]othing in this section shall be construed to permit suits against the United States based upon adverse possession.” 28 U.S.C. § 2409a(n). In addition, 28 U.S.C. § 2415(c) provides that “[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.” The “herein” refers to the various statutes of limitations on suits brought by the government. Thus, the government cannot be sued on an adverse possession theory, and there is no time limit on a suit by the government to eject a trespasser or “adverse possessor.” Therefore, as many courts have noted, no one can acquire title to government property by adverse possession. E.g., United States v. Pappas, 814 F.2d 1342, 1343 n.3 (9th Cir. 1987); Sweeten v. U.S. Department of Agriculture, 684 F.2d 679, 682 (10th Cir. 1982); United States v. Santos, 878 F. Supp. 1359, 1362 (D. Guam 1993). As the Supreme Court stated in United States v. California, 332 U.S. 19, 40 (1947) (footnote omitted):

> “The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.”

There is a limited statutory exception, the Color of Title Act, 43 U.S.C. § 1068.[127] The law was enacted in 1928 to enable persons, mostly in the western states, to acquire title to property upon which they resided and which turned out, upon being surveyed, to be

[127] A very few similar statutes are also on the books, but they have extremely limited application, for example, 43 U.S.C. §§ 177 and 178, applicable only to certain lands in New Mexico.

government land.[128] There are two classes of claimants. The first is a person who has possessed the land in good faith and under claim or color of title for more than 20 years, and who has either made valuable improvements to the land or placed part of it under cultivation. The second is a person who possesses the land in good faith and who can trace a "chain of possession" back to at least January 1, 1901, and who has paid state or local property taxes on that land. A claimant, by applying in accordance with Interior Department regulations (43 C.F.R. Part 2540), can purchase up to 160 acres, with mineral rights reserved to the United States. Conveyance is mandatory to a "class I" claimant, discretionary to a "class II" claimant.

The statute sets a price of "not less than $1.25 per acre." Under the regulations, the price is fair market value at the time of appraisal, reduced to reflect value resulting from improvements or development by claimants or their predecessors, and giving consideration to "the equities of the applicant." 43 C.F.R. § 2541.4(a).

A statutory condition for both classes of claimants is that the land be held in good faith. Under the regulations, knowledge that the land is owned by the United States precludes a finding of good faith. This has been upheld as a reasonable interpretation. Day v. Hickel, 481 F.2d 473, 476 (9th Cir. 1973). Until Interior determines that an application meets the statutory requirements, the applicant does not have a vested property interest, merely a priority to purchase. Cavin v. United States, 956 F.2d 1131 (Fed. Cir. 1992) (applicant cannot maintain inverse condemnation suit).

It has been stated that land which has been withdrawn from the public domain "is not subject to the Color of Title Act because it is already appropriated for other purposes." Beaver v. United States, 350 F.2d 4, 10 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966). Since all public domain lands have been "withdrawn" at least to some extent, perhaps it is more accurate today to say that the statute does not apply to land which has been withdrawn from the public domain and reserved to some use or uses. E.g., United States v. Vasarajs, 908

[128]See M.H. Schwarz, Comment, A Practitioner's Guide to the Federal Color of Title Act, 20 Natural Resources Journal 681 (1980).

F.2d 443, 446 n.4 (9th Cir. 1990) (Color of Title Act not applicable to land on military reservation).

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